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Supreme Court, U.S.
FILED

97 • 439 SEP - 4 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

ERNEST L. JARRETT, Attorney,

Petitioner,

vs.

ROSE MARY GREEN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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16 pp

QUESTIONS PRESENTED

I. Whether the district court improperly refused to relinquish jurisdiction so as to pre-empt settlement proceedings in a state court of competent jurisdiction, thereby enabling the Court to substitute its judgment for that of the officials of a state governmental entity, and to impose new federal policy in derogation of state courts and controlling state law?

II. Whether the federal court may impose federal policy with respect to attorney fees in a manner which circumvents controlling state law policy?

III. Whether disqualification should be required when the judge assumes the role of an advocate in the case?

LIST OF PARTIES

The parties having an interest in this Petition are listed below:

Brunetta Brandy, Jesse Green, Jr, Ollie Brye, Kim Nihiser, as mother and Next Friend of Jacqueline Dennison, a minor; Peggie Wright; First Busey Trust and Investment Company, as Guardian of the Estate of Jacqueline Dennison; Shakieta Strawter; Lachita Milelr; Edniquech Grubbs; Patricia Green; Treise Green; Sherry Green; and Monica Green.

The City of Detroit paid the amount negotiated in settlement in this matter and has no interest in the disposition of this Petition.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Green v. Nevers, et al.*, 111 F.3d 1295 (6th Cir. 1997). (App. A).

The Opinions of the district court in *Green v. City of Detroit*, CA 92-CV-76882 DT are not published. (App. B, C, D and E).

STATEMENT OF JURISDICTION

Petitioner seeks review of the April 29, 1997 Opinion of the United States Court of Appeals for the Sixth Circuit, which affirmed the judgment and orders of the United States District Court for the Eastern District of Michigan.

A timely filed Motion for Rehearing was denied by the Court of Appeals by Order entered on June 6, 1997.

Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES, RULES AND OTHER AUTHORITIES INVOLVED

The statutes, rules and other authorities involved in this Petition are as cited below (Michigan Court Rule 8.121, Michigan Rule of Professional Conduct 1.5, Revised Probate Code 700.543, Revised Judicature Act; MCL 600.2922, 28 U.S.C. § 455, 28 U.S.C. § 144 and Federal Rules of Civil Procedure 41(a)(1)(i) and 41(a)(1)(ii)). The pertinent text of these statutes are set forth herein as Appendix F.

STATEMENT OF THE CASE

On November 5, 1992, Malice Wayne Green was beaten and killed by officers of the Detroit Police Department.

On November 8, 1992, the decedent's surviving spouse, Mrs. Rose Mary Green and his surviving daughter, Ms. Edniquech Grubbs each acting with the knowledge and consent of the other retained Attorney Brunetta Brandy to bring a wrongful death action on behalf of the estate and the next of kin.

On November 9, 1992 Mrs. Green and Ms. Grubbs were appointed as co-personal representatives of the decedent's estate by the Wayne County Probate Court and on the same day a wrongful death action was commenced in the Wayne County Circuit Court. Approximately one week later, the Petitioner was asked to participate as co-counsel in the matter and he agreed to do so under a fee sharing arrangement with Ms. Brandy.

Days later, the Corporation Counsel for the City of Detroit, Mr. Donald Pailen, contacted Ms. Brandy, expressing his desire to explore the possibility of settling the case promptly. His willingness to negotiate at that time was expressly conditioned upon an agreement that the negotiations be conducted confidentially and in the event agreement was reached, the settlement being placed on a temporarily sealed record, remaining confidential throughout the pendency of criminal proceedings then underway against the officers involved.

On November 30, 1992, while settlement negotiations were in progress, the City of Detroit filed its petition for removal, removing the case from the state circuit court to the federal district court.

On December 11, 1992, the parties to the wrongful death action reached agreement for settlement of the case in the form of a structured settlement. A deadline of December 23, 1992 to purchase the contemplated annuities was imposed by the insurance company offering them.

On December 14, 1992, the attorneys for the parties visited the chambers of the district court judge and requested the entry of a stipulated order of remand. Without explanation, the district judge refused to enter the remand order, and inquired into the amount of the settlement. He was informed of the approximate value of the package. He was also advised of the City's condition that the settlement remain confidential until after the conclusion of the related criminal proceedings. The judge opined that sealing the record was inappropriate.

After leaving the judge's chambers, the attorneys for the estate prepared a Notice of Dismissal pursuant to F.R.C.P. 41(a)(1)(i). The complaint was then refiled in the Wayne County Circuit Court.

On December 18, 1992, the parties and their respective attorneys, along with an attorney representing the claimants, appeared in the circuit court for the purposes of submitting the settlement for judicial approval, but could not have the matter heard prior to the December 23 deadline.

On December 22, 1993 the attorneys met with the district judge in chambers, at the behest of Mr. Pailen, at which time Pailen implored the judge's reconsideration with respect to temporarily sealing the settlement record. The judge promised to give Mr. Pailen's request further thought and instructed the attorneys to read the entire settlement package to him. During the reading of the structured benefits the judge asked about the present value of each component explaining that he needed to know the costs as he intended to "exercise the latitude" to determine that the "settlement was for too much money" in which case he would "rebate" the amount he deemed to be "excessive" to the City of Detroit. The judge flatly rejected the protest of the Petitioner and other attorneys present that he did not have authority to order a reduction of a negotiated settlement.

Following the reading of the settlement package, the district judge instructed the attorneys to go into his courtroom and to await his arrival. Because the Petitioner believed that any attempt to impose a "rebate" would destroy the settlement, he advised the judge that he did not wish to proceed at that time. The judge responded angrily by saying "Mr. Jarrett, you're not going to stampede me into approving this settlement today". He then ordered the attorneys to go into his courtroom.

Once on the record, the Petitioner again expressed his desire not to proceed, which the judge initially rejected. However, during an off-the-record sidebar discussion, it was agreed that a record would be made of those claimants who were present from other states, solely to preserve their testimony. After this testimony was taken, the judge surprised the attorneys by requesting their stipulation to reinstate the matter on his docket. The Petitioner initially resisted this request, but the judge persisted and in the confusion of the moment, coupled with miscommunications between the Petitioner and Ms. Brandy a "stipulation" was offered.

On December 23, 1992, the Petitioner discussed the matter with an attorney for the City and tentatively agreed to stipulate to dismiss the case pursuant to F.R.C.P. 41(a)(1)(ii). The City's attorney could not act on the agreement, however, until approved by her supervisor, who had by then left town for a holiday vacation.

Attorneys Justin Ravitz and Joseph Phebus were then retained by several of the decedent's next of kin.

The settlement agreement was renegotiated calling for the payment of $5.25 million in cash, during the first week in January 1993. Thereafter a Stipulation for Dismissal pursuant to F.R.C.P. 41(a)(1)(ii) was filed on January 7, 1993.

On January 8, 1993, a member of the judge's staff contacted

the Petitioner, requesting that the Petitioner make himself available for a conference telephone call with the judge, who was then in Memphis, Tennessee. After relaying the Petitioner's statement that the matter had been dismissed by stipulation the day before, the judge sent a message of his own, threatening the Petitioner with reprisals if he failed to make himself available for the call.

At the outset of the January 8, 1993 conference call the Petitioner again advised that the case had been dismissed by stipulation, to which the judge responded by stating that he had not signed an order of dismissal. When the Petitioner attempted to explain that under the rule, no order of the court was required, the judge advised the Petitioner that he would not be able to avoid "full media scrutiny". The judge then ordered all of the attorneys to appear before him on January 11, 1993, but declined to explain why.

On January 11, 1993 the attorneys for the parties, along with the newly retained attorneys for some of the claimants met in-chambers with the judge. During the conference the Petitioner reiterated his position that the court lacked jurisdiction, to which Messrs. Ravitz and Phebus voiced objections. Petitioner responded by pointing out that under the Wrongful Death Act, the decedent's next of kin were not parties to the action, hence neither Mr. Ravitz nor Mr. Phebus had standing to object. This comment was ignored by the judge who again advised the Petitioner that he would be unable to escape "full media scrutiny". The discussion then turned to the renegotiated form of the settlement, whereupon the judge ordered the attorneys to advise all of the next of kin not already represented, to retain counsel. Petitioner suggested that their retention of counsel should be optional rather than court ordered, and was at best premature. The district judge responded by saying that he wanted all of the next of kin to be represented because he wanted to address issues of distribution of settlement proceeds and of settlement approval simultaneously in order to permit him to

determine the adequacy of compensation to the claimants and to "rebate" any amounts which were excessive. He again rejected protests from the attorneys that he lacked authority to reduce the negotiated settlement amount, though he declined to cite any authority for the proposition. He also offered unsolicited opinions about how the proceeds should be allocated, favoring some claimants over others, though no record existed to support these assessments.

As new attorneys were retained, as the judge instructed, the judge repeated his conditions to his consideration of the settlement, as well as his opinions about how the money should be allocated. Petitioner submits that the judge's opinions on the issue of distribution contributed to divisions amongst the attorneys for the claimants, and inspired some attorneys to demand unreasonable portions of the proceeds. Soon thereafter, the sum of demands for shares of the settlement exceeded the total settlement by nearly two million dollars. This coupled with the *de facto* standing which the judge had conferred upon the nonparty claimants to act as if they were separate plaintiffs to the action, in turn threatened to undermine the settlement, as those who perceived that their clients would receive larger shares of the proceeds sought to remain in federal court, while those who did not joined the estate's attorneys in contending that the January 7, 1993 stipulation for dismissal had effectively divested the court of jurisdiction. Ultimately, however when in a subsequent conference the judge repeated his stated intent to reduce the total settlement amount by imposing a "rebate" and efforts to persuade him that he lacked the authority to do so failed, the attorneys reached unanimity in concluding that the settlement should not proceed before the judge. Accordingly, on March 7, 1993 the co-personal representatives, all claimants and all of their attorneys met in an effort to reach a comprehensive agreement for the distribution of the settlement proceeds. Given the increased demands for shares of the proceeds which exceeded the total settlement amount, it was feared that the settlement would be doomed by internal disagreement if an agreement was not

reached. To facilitate the negotiations, the Petitioner and his co-counsel agreed to waive $550,000 of the attorney fees payable under the contingent fee agreement. Aided by two mutually selected mediators, and the partial waiver of attorney fees, the comprehensive agreement was reached. This agreement was reduced to writing and signed by both fiduciaries, all claimants and all attorneys.

On March 8, 1993, the parties prepared to proceed in the Wayne County Probate Court to seek judicial approval of the gross settlement amount. When the district judge learned that a hearing in that court was to take place later that day, he sent a message to the attorneys, warning them not to proceed, otherwise he would (1) issue a stay order; (2) hold the attorneys in contempt; and (3) report the attorneys to the bar. The Petitioner believed that the district judge lacked jurisdiction to act as threatened but feared that if the judge did act as threatened, anticipated negative media coverage could adversely influence misinformed members of the Detroit City Council, causing them to retreat from the settlement. Consequently, the attorneys decided to meet with the judge in order to clearly express their unanimity in choosing to proceed in the probate court.

On March 25, 1993, the attorneys for the parties and for all of the claimants met, with the judge, each of whom stated their opinions that the January 7, 1993 stipulation had effectively dismissed the case, and that the parties were free to proceed in the probate court. The two attorneys who had previously expressed objections to the dismissal, withdrew their objections. The district judge appeared visibly angered by these developments and he announced that he would "show cause" the attorneys. When asked by one attorney what issues were to be addressed in response to the show cause order, the district judge angrily told the attorney that he had "better not say another word".

A show cause order was promptly prepared and given to each lawyer as they left the judge's chambers. The order required the

attorneys to "show cause why the case should be dismissed". Given the vague language of the order the parties, with the full concurrence of the claimants, prepared and filed briefs focusing upon the technical operation of Rule 41(a)(1)(ii), and argued that the case had in fact already been dismissed by the filing of the stipulation.

On April 13, 1993, the attorneys for the parties and the claimants appeared for the hearing on the court's order to show cause. To the Petitioner's surprise, upon his arrival he found a television camera present in the courtroom which was also filled with reporters. Soon thereafter the judge commenced the proceedings by reading his 38 page Opinion and Order determining that the court continued to have jurisdiction in the case. The court held that (1) the January 7, 1993 stipulation for dismissal was ineffective as it had not been signed by all of the parties (holding that the claimants were parties to the action); (2) the parties had waived their right to rely upon the dismissal by their continued participation in the federal court (notwithstanding the fact that the judge had ordered them to appear); and (3) the court was exercising its "inherent powers" to disregard the stipulated dismissal, which according to the court, was filed in bad faith by attorneys, engaged in "forum shopping" to protect "excessive and extravagant" attorney fees. In the Opinion the judge reiterated his intent to "rebate" any amount he deemed to be excessive, but for the first time, suggested that only attorney fees would be subjected to a possible rebate. The judge's opinion was widely reported in the media, and the attorneys were for the most part, cast in the roles of villains by news accounts and editorials.

In the weeks following the April 13 proceeding, the court denied two motions for rehearing, and three separately filed motions calling for its the disqualification. With respect to the motion for rehearing filed by the Petitioner the court rejected his argument that the attorneys had been given no notice of the issues to be considered by the court, hence they had no meaningful opportunity

to be heard by calling the argument "specious" in light of an article which appeared in the April 12, 1993 edition of the Detroit Free Press. The court also rejected the arguments that there was no record to support the court's findings, and that the court's recitation of facts was substantially inaccurate, concluding that these contentions by the attorneys amounted to no more than their continued effort to gain impermissible fees.

With respect to the motions for disqualification, the court denied the motions without hearing and without referring the two brought under 28 U.S.C. § 144, which were supported by affidavits, to a neutral judge for disposition. In one of the disqualification motions, Attorney Kenneth Hylton, Jr., contended that the judge had been motivated by racial bias against African American claimants and attorneys. The court relied upon a news article appearing in the June 2, 1993 edition of the Detroit News to suggest that Mr. Hylton had disclaimed the allegation in his remarks to the press.

On June 7, 1993 the court entered an order to show case, requiring the parties to either submit the settlement to the court for its consideration or to show cause why the case should not be dismissed. Seeking to avoid dismissal of the case, the Petitioner filed a motion for approval of the settlement, but did not submit the question of distribution of its proceeds, in order to avoid the possibility of a court imposed "rebate".

On July 13, 1993, the court entered an order denying the motion, holding that it would not approve the settlement without also passing on the issue of distribution, including attorney fees, thereby enabling the court to impose a rebate. Included in this order was the court's determination that the allocations of proceeds contained in the March 7, 1993 agreement to the claimants, including the minors, was fair and adequate.

On July 26, 1993 the Petitioner filed a Petition for Writ of Mandamus in the Court of Appeals for the Sixth Circuit. The Petition remained pending in that court for approximately one year without disposition. During its pendency the district judge would not act with respect to any aspect of the case. During the pendency of the Mandamus Petition, the Petitioner engaged in frequent and lengthy discussions with the City's attorneys, urging them to depart from the City's longstanding settlement process, by submitting the settlement to Detroit City Council for ratification, *before* the settlement received judicial approval. Although initially rejected by City attorneys, the proposal ultimately prevailed and the settlement was submitted to and ratified by the City Council in the Spring of 1994.

Following City Council ratification, the parties returned to the district judge seeking entry of a Consent Judgment thereby approving the settlement. The judge declined to enter the judgment unless and until the Petitioner withdrew his still pending Mandamus Petition. Reluctantly, the Petitioner withdrew the Mandamus Petition and the Consent Judgment was entered on July 19, 1994.

On September 7, 1994 the judge entered an order inviting proposals as to how the settlement proceeds should be allocated, notwithstanding his knowledge of the March 7, 1993 comprehensive agreement. The attorneys for the co-personal representatives and all of the claimants filed responses indicating that the proceeds should be disbursed in accordance with the March 7 agreement. Despite the unanimity of the responses, the court held a hearing on the issue on October 21, 1994. Without prior notice of the issue and notwithstanding the absence of any dispute or objections by either co-personal representative or any claimant, the judge declared the contingent fee agreement between the co-personal representatives and Ms. Brandy to be invalid and unenforceable, by finding that the co-personal representatives had not acted "jointly" as required under Michigan law, because they had signed

separate contingent fee letter-agreements, rather than both signatures appearing on the same sheet of paper. The judge omitted to mention the March 7, 1993 agreement upon which their signatures appear on the same page and which, *inter alia*, specified the amount to be paid in attorney fees, in his November 7, 1994 order which incorporated this ruling.

The court also held that the fee sharing arrangement between the Petitioner and Ms. Brandy violated the Michigan Rules of Professional Conduct, because co-personal representative Edniquech Grubbs had "objected" to the Petitioner's participation as co-counsel, even though Ms. Grubbs had in fact never voiced such objections at any time.

By separate order, also entered on November 7, 1994, the court ordered disbursement of settlement proceeds to all claimants exactly in accordance with the March 7, 1993 agreement, and approved the attorney fees of each of the claimants' respective attorneys in accordance with their respective fee agreements.

Petitioner then filed four motions, including one which sought to take testimony on the question of the "joint" nature of the co-fiduciaries' retention of Ms. Brandy. None of the motions received rulings from the court.

On July 30, 1995, the court entered its order awarding attorney fees to the Petitioner, Ms. Brandy and Attorney Saunders Dorsey on a quantum meruit basis. The court's award, effectively reduced the fees claimed by more than $750,000. Mr. Dorsey had belated claimed that he also represented the estate and should be paid accordingly. This assertion was disputed by Petitioner, Ms. Brandy and others. It was, however, undisputed that Mr. Dorsey's "retention" occurred after the settlement had been fully negotiated and that Mrs. Green had no knowledge of, hence she had not approved, Dorsey's retention. Despite the fact that the co-fiduciaries

had clearly not acted jointly in "retaining" Mr. Dorsey, the court awarded to him attorney fees as an attorney for the estate.

The Petitioner and Ms. Brandy appealed the orders of the district court. The Court of Appeals affirmed the district court, calling the matter an "unseemly spectacle" but failing to address most of the issues raised by the Appellants in their briefs.

REASONS FOR GRANTING THE WRIT

I. WHETHER THE DISTRICT COURT IMPROPERLY REFUSED TO RELINQUISH JURISDICTION SO AS TO PRE-EMPT SETTLEMENT PROCEEDINGS IN A STATE COURT OF COMPETENT JURISDICTION, THEREBY ENABLING THE COURT TO SUBSTITUTE ITS JUDGMENT FOR THAT OF THE OFFICIALS OF A STATE GOVERNMENTAL ENTITY, AND TO IMPOSE NEW FEDERAL POLICY IN DEROGATION OF STATE COURTS AND CONTROLLING STATE LAW?

Though lambasted in the presence of television cameras and a courtroom filled with reporters as having employed procedural devices exclusively for the unethical purpose of recovering "excessive and extravagant" attorney fees, the district court's pronouncements of April 13, 1993 actually begged the question then before the court, while simultaneously obfuscating the points of law, about which the parties were not in dispute. At issue was the right of the parties, having already reached agreement for the settlement of their case, to have that settlement reviewed in a Michigan court and in accordance with the Michigan statute under which the suit was brought. There was no dispute between the parties which required judicial resolution. Rather, the only controversy in question focused upon the court's stated intent to "exercise the latitude" to determine that the settlement "was for too much money" and to "rebate" any amount it deemed to be "excessive".

By enacting the Wrongful Death Act, MCL 600.2922, the Michigan legislature provided for one action for wrongful death in order to avoid a "multiplicity of suits" and exclusively empowered the personal representative(s) of the decedent's estate with the authority to bring the wrongful death action for the benefit of the estate and the decedent's next of kin. *MacDonald v. Quimby*, 350 Mich. 21 (1957); MCL 600.2922(2). The court in *MacDonald* described the role of the fiduciary as occupying a "trust relationship" for the benefit of the next of kin, who could stake their claims for damages only through the action brought by the personal representative. (*See also Burns v. VanLaan*, 367 Mich. 485 (1962); *Maiuri v. Sinacola Construction Co.*, 382 Mich. 391 (1969); *O'Dowd v. General Motors Corp.*, 429 Mich. 597 (1984)) (In accord see: *Roberts v. Gateway Motel of Grand Rapids, Inc.*, 145 Mich. App. 671 (1985)).

Because the interests of the estate and the next of kin may only be prosecuted by their surrogate in the person of the fiduciary, the statute requires judicial approval of all settlements. (MCL 600.2922(6)). Petitioner submits that this requirement was intended solely as a safeguard to protect the beneficial interests of the estate and the next of kin, who cannot directly participate in the action. It was not intended to allow the reviewing court to second-guess the Defendant's wisdom in offering to settle a case, even when the Defendant is a governmental entity. The statute does not authorize the reviewing court to reduce the negotiated settlement amount, any more than it authorizes that court to order that a Defendant pay more than it is willing to offer.

Thus, Petitioner submits that in the first instance, the court's contemplation of the imposition of a "rebate" represented an impermissible attempt by the district court to impose a *de facto* amendment of the state statute.

Not only did the prospect of a court imposed "rebate" exceed

the authority conferred by the statute, it also represented the court's intrusion into the exclusive province of the officials of the City of Detroit in their decision about how best to protect the City and its taxpayers.

This Court has consistently protected the delicate balance between the sovereignty of the states and the power of the federal government in our dual sovereignty system. In *Printz v. United States*, __ U.S. __, 117 S. Ct. 2365 (1997) and in *New York v. United States*, 505 U.S. 144 (1992) this Court has stated that "state legislatures are not subject to federal direction". Such limits on federal power would undoubtedly apply to the federal judiciary when called upon to interpret and/or apply state law. When a federal court applies state law in a manner which is tantamount to imposing an amendment of the state law, it is acting impermissibly to supply "federal direction" to the state's legislature. The court's stated intent to exercise the latitude to impose a "rebate" contemplates the use of discretion not authorized by, and thus amendatory to the statute.

Similarly, in *Printz* and *New York*, *supra*, this Court left no room for the federal government, including the federal court, to pejoratively substitute its judgment so as to supersede the wisdom of decisions made by the officials of a state governmental entity. Quoting *New York*, *supra*, the Court in *Printz*, restated its view that the Constitution "contemplates that a state's government will represent and remain accountable to its own citizens". The very notion that the City of Detroit had agreed to settle this suit for "too much money" can be viewed only as the court's attempt to substitute its judgment for that of the collective wisdom of the City of Detroit's officials.

When the court stated its intent to exercise impermissible authority to impose a "rebate" of the negotiated settlement amount, it simultaneously created a legitimate reason for the parties, acting

through their attorneys, to resist this effort which was totally unrelated to attorney fees. Not only might this unauthorized exercise of discretion have created undue confusion or delay in consummating the agreement, thereby frustrating a primary objective of settlement, it also threatened to destroy the settlement entirely. Thus in an effort to protect the settlement from potential overreaching by the Court, the parties filed their stipulation to dismiss the action pursuant to F.R.C.P. 41(a)(1)(ii), thereby clearing the way for them to proceed in the state probate court.

The district court, however, disregarded this stipulation in its Opinion and Order of April 13, 1993, and did so by disregarding or circumventing other controlling state law.

First, it held that the stipulation was defective because it had not been signed by all of the "parties" to the action as required by the rule. In so doing the court literally amended MCL 600.2922(2) so as to expand the class of persons who are "parties" to a wrongful death action. This ruling is irreconcilably inconsistent with the well settled Michigan case law which has consistently held that only the personal representative may serve as the "party" bringing a wrongful death action. *MacDonald, supra.* Absent a grant of intervention, the next of kin have no standing to direct the course of the suit. *Roberts, supra.* Since under the Michigan law the claimants are not "parties" to the wrongful death action, their signatures on the Rule 41 stipulation were not required and no defect in the stipulation existed. Moreover, when the objecting claimants withdrew their objections, the issue became moot regardless of their standing as parties.

Secondly, the court held that the stipulated dismissal had been "waived" because the parties had continued to participate in conferences conducted in the federal court. The court failed to state in its opinion, however, that it had compelled the parties to appear over their repeatedly asserted jurisdictional objections. The concept

of an action, once dismissed by Rule 41 stipulation, being simply "waived" into renewed viability appears to sharply conflict this Court's holding in *Kokkonen v. Life Insurance of America*, __ U.S. __, 114 S. Ct. 1673 (1994). Furthermore, the Petitioner submits that the court cannot engineer its own "waiver" in order to retain jurisdiction.

Thirdly, the "bad faith motives" of the attorneys in their quest for "excessive and extravagant" attorney fees was the stated premise for court's exercise of its "inherent powers" to set aside the Rule 41 stipulation for dismissal, which served as the centerpiece of the court's decision.

Having failed to give the attorneys notice to defend or explain their conduct, the court imputed "bad faith" in their motives solely on the basis of its misassumption that the fees they sought had been the impetus behind the filing of the Rule 41 stipulation and were in fact "excessive and extravagant." By treating the fees as if they were excessive per se, the court completely disregarded the conclusive determination in Michigan that attorney fees payable under a contingent fee contract in a wrongful death "claim or action", which are equal to or less than one-third of the amount recovered by way of settlement or judgment are deemed to be "fair and reasonable". This determination of the Michigan Supreme Court, found at MCR 8.121 is, by its terms, unequivocal and pre-empts any contrary judicial determinations relative to the "reasonableness" of fees computed pursuant to its formula. Thus, when the district court held that the fees sought in this case were "excessive", it essentially repealed MCR 8.121 or impliedly held that the rule would not be binding on the federal court. Since the imputed "bad faith" motives of the attorneys was inextricably tied to the "reasonableness" of the fees they sought, the court's continued exercise of jurisdiction based upon this issue is only as valid as its disregard of the rule provision. Petitioner submits that the court was without authority to repeal or create an exception to the

Michigan Supreme Court's determination about the reasonableness of attorney fees payable pursuant to contingent fee contract. Like the state's legislature, the state Supreme Court is not subject to federal direction in determining policy related to attorney fees. Furthermore, Petitioner submits that the federal court may not refuse to implement controlling state policy, in order to impose federal policy which is inconsistent therewith. The court is also not free to assume the motives of attorneys without asking them first.

Similarly, the district court accused the attorneys of seeking to "sweep the matter under the rug" and to avoid appropriate judicial scrutiny of the settlement and their fees by filing the Rule 41 stipulation, even though the court knew that the parties intended to proceed in the state probate court as permitted by the statute to do (*see* MCL 600.2922(9)). Implicit in this comment is the court's assumption that the state probate court would be unable or unwilling to give appropriate judicial scrutiny to any aspect of the settlement. Petitioner submits that such a comment on the competence or integrity of the state probate court should not be permitted. It either implies that the federal court is better situated than the state probate court to apply state probate law or that the federal court knows better than the policymakers of the state, what the policy should be.

Similarly, by criticizing the City's attorneys for simply "throwing in" with the estate's attorneys in their purported attempt to exact impermissible fees, the court was again seen to substitute its judgment for that of the City's lawyers, in its assessment of the need to protect the City's "taxpayers". Unable to attribute the base motive of greed to these lawyers, the court appears never to have considered that they had simply offered a good faith, if not correct, assessment of the court's lack of jurisdiction in light of the stipulation.

The court's exercise of its "inherent powers" to retain

jurisdiction so as to continue in its involvement in the settlement of this case appears to be strikingly similar to the exercise of such authority which this court refused to sustain in *Kokkonen, supra.* There as instantly the district court resorted to its "inherent powers" so as to retain jurisdiction solely to participate in proceedings related to settlement. This Court reversed the district court's efforts by restating the unequivocal divestment of the court's jurisdiction a properly executed Rule 41 stipulation produces. In the case at bar, the district court's disregard of the Rule 41 stipulation was a mechanism employed by the court to pre-empt the undisputed preference that settlement proceedings be conducted in the state court. In so doing the court enabled itself to modify or entirely disregard state policy, in favor of its own new articulation of federal policy. Petitioner submits that this is an impermissible intrusion upon the sovereignty of the state, its legislature and its courts.

For these reasons, Petitioner respectfully submits that certiorari should be granted in this matter.

II. WHETHER THE FEDERAL COURT MAY IMPOSE FEDERAL POLICY WITH RESPECT TO ATTORNEY FEES IN A MANNER WHICH CIRCUMVENTS CONTROLLING STATE LAW POLICY?

Although it premised its retention of jurisdiction in substantial part on its view that the attorney fees sought in this matter were "excessive", the ultimate disallowance of the full amount claimed was not premised upon any finding that the fees were "excessive". The court apparently retreated from this position without announcement, recognizing that the fees sought were less than the maximum permitted by MCR 8.121, and as such, could not legitimately be characterized as "excessive".

Additionally, the Detroit City Counsel rejected the court's highly publicized offer to "rebate" a portion of the settlement, when

it ratified the agreement before the anticipated judicial determination had been made. The court clearly could not rebate money to an unwilling recipient.

The court nevertheless accomplished at least one of its stated objectives, by simply attacking the claim for attorney fees in a different manner. Petitioner submits, however, that not only was the end result still contrary to the controlling state law, but also the means by which it was accomplished is equally contrary to applicable state law.

Following the delayed approval of the gross settlement amount, the co-personal representative and the claimants sought the court's adoption of the March 7, 1993 comprehensive distribution agreement which included the specific amount to be paid to the Petitioner and his co-counsel in attorney fees. Under the Wrongful Death Act, the court is statutorily bound to adopt such an agreement when reduced to writing and consented to by all members of the decedent's next of kin (MCL 600.2922(6)(e)).

In its opinion which affirmed the district court, the Court of Appeals correctly noted that the reviewing court is not necessarily bound by a distribution plan when one or more of the claimants is a person protected under the statute. In this case, the minor-claimants are protected persons as defined by this section of the statute. Their presence within the class of claimants does not invalidate an agreement for distribution *per se*, however. Instead the reviewing court is required to independently determine the adequacy of amounts allocated to the minors by the agreement, and the court may disallow the agreement only if it determines that the amounts allocated to minors are insufficient. If the court independently determines that the amount(s) allocated to the minor(s) to be fair and adequate, then the agreement is otherwise enforceable and binding upon the court. In this case, the court twice ruled that all allocations, including the amounts allocated to minors,

were fair and adequate. It did so first in its order entered on July 13, 1993, and repeated its finding in its order of November 7, 1994. Petitioner submits that once these findings were made, the March 7, 1993 agreement became binding upon the court which was not free to modify it or to disregard any other part of it.

Notwithstanding these findings, and the language of the statute which requires the court's adoption of the agreement, the court disallowed the amount claimed in fees by the attorneys who relied upon the agreement, by ignoring the agreement altogether, as it relates to fees. For the purposes of determining attorney fees the court treated the agreement as if it did not exist, neither enforcing its terms with respect to fees, nor explaining why it was not controlling on the issue. Curiously, the court approved disbursement of all other proceeds called for in the agreement in strict compliance with its terms. Only the attorney fee provision was disregarded by the court.

In essence what the court did was, in the absence of any dispute or objections by the co-personal representatives or the claimants, the court, without notice and without allowing the attorneys to be heard on the subject, focused exclusively on the contingent fee agreement-letters signed by the co-personal representatives on November 8, 1992, and declared them to be invalid while simultaneously ignoring the principle document which the lawyers relied upon to determine their fees.

Citing *Action Auto, Inc. v. Anderson*, 165 Mich. App. 620 (1988), *lv. den.*, 430 Mich. 87 (1988), the court held that because the co-fiduciaries signatures appeared on separate agreement/letters, rather than both signatures appearing in the same writing, the co-fiduciaries had not acted "jointly" and therefore the original fee contract was invalid. *Action Auto* was clearly misapplied by the court. In that case, the Michigan Court of Appeals invalidated a contract for the sale of estate property, not because three co-

fiduciaries of the estate had not signed the same sheet of paper in entering into the contract, but rather because one co-fiduciary had acted unilaterally, without the knowledge or consent of his two counterparts. The issue in *Action Auto* was not the manner of execution of the written agreement, but rather, the fact that two of the fiduciaries knew nothing of the transaction at all. As two of the fiduciaries had been totally excluded from the decisionmaking process which led to the contract, they had not "jointly" entered the contract, thus rendering it invalid. One might speculate that if all three had concurred in the decision to enter the contract and the ministerial task of signing the contract had been delegated to only one of them, that that would have been sufficient joint action by the fiduciaries to sustain the contract.

By contrast, in the case at bar the two co-fiduciaries acted together, each with the knowledge and consent of the other to retain Ms. Brandy. They acted on the same day, with the same purpose and executed identical letters of retention to accomplish their goal. As such Petitioner submits that they acted jointly in this effort, regardless of the number of instruments which were signed to accomplish their objective. No person other than the judge contended otherwise. Consequently, the Petitioner submits that the factual predicate to the ruling is not supported in the record, and should not have been assumed by the court. This is particularly true when there was no dispute or controversy on the issue in the first place.

It is well-settled in Michigan contract law, if not in other jurisdictions, that a contract may be formed by one instrument or by separate instruments, executed reasonably contemporaneously, in relation to the same matter and made as one transaction. In such cases the instruments must be read together and construed as one instrument. *West Madison Investment Co. v. Fileccia*, 58 Mich. App. 100 (1975); *Culver v. Castro*, 126 Mich. App. 824 (1983). In this case, the court made no attempt to construe the identical retention

letters, executed on the same date as one instrument. Rather it seized upon the separately signed instruments as providing a basis for disallowing the fees, and rendered a ruling before a factual record or any legal arguments which might have dictated a different result could be offered. Such action by the court bespeaks of a patent attempt to reach a result without regard to the facts or controlling law.

In its opinion which affirmed the district court, the Court of Appeals stated that there was no evidence that the women had acted "jointly". This is true only because there was no evidence on the issue, one way or the other. There had been no notice that the issue was to be considered until after the ruling was made. Thus no evidence was submitted by anyone on the issue. This certainly raises due process questions, as the attorneys had no opportunity to litigate the issue before their claim to the fees was denied.

Conspicuous by its absence, was the court's complete failure to even speak about the March 7, 1993 distribution agreement as it affected a determination of attorney fees, notwithstanding the fact that the fees are specified as the first item in that agreement. Because the agreement was not only signed by both co-personal representatives *on the same sheet of paper*, but was also signed by every other claimant and every participating attorney, it could not be assailed as not reflecting the "joint" actions of all concerned. Clearly this agreement either cured the purported technical defect of the original agreement, or created an independently enforceable new agreement, either of which would render the court's analysis of the original contract, moot. However, in the absence of any basis to invalidate the March 7 agreement, the district court simply ignored it with respect to attorney fees, while applying the same agreement for all other purposes. MCL 600.2922(6) does not permit the court to bifurcate a distribution agreement. The agreement is binding on the court except when a protected person's interests are not adequately protected thereby.

By adopting the agreement in part while disregarding other aspects of it entirely without any explanation, the district court circumvented the unambiguous language of the wrongful death statute, once again revealing its willingness to disregard state law in favor of federal policy, if not personal predilection.

Additionally, this ruling also circumvents the language of MCR 8.121 which determines that fees equal to or less than one-third of an "expressed or implied" contingent fee agreement are deemed to be "fair and reasonable." Assuming arguendo that the original contract had been executed in a defective manner, the intent of the parties was nevertheless clear with respect to the fees being contingent in nature, and how they were to be computed. No other fee arrangement had been made and no one has claimed that a different arrangement was intended. Thus at a minimum, the agreement was "implied" thus entitling the attorneys to their "fair and reasonable" fees payable under their intended and "implied" agreement.

The court also suggested that the contingent fee letter/ agreements were ambiguous with respect to the reason for Ms. Brandy's retention, and set forth the text of the letter signed by Mrs. Green to demonstrate that fact. Omitted from the court's reproduction of this agreement, however, is its caption which reads: "Re: Estate of Malice Green; Wrongful Death Action." Such a glaring omission by the court cannot be accidental.

Finally, the court also held the contract to be invalid because it had not been approved by the probate court. MCL 700.543 expressly provides that a fiduciary "may employ counsel", "[w]ithout obtaining a court order". Thus, once again we find the federal court requiring what state law expressly states is not required.

Having declared the contingent fee agreement to be invalid, the court went further to declare that the fee sharing arrangement

between the Petitioner and Ms. Brandy violated Michigan Rule of Professional Conduct 1.5(e) based upon its assertion that Ms. Grubbs had objected to the Petitioner's participation in the case. Ms. Grubbs, however never voiced any such objection. The court literally made that up.

In sharp contrast to its own ruling the court permitted the claim of Attorney Saunders Dorsey even though Mr. Dorsey had not appeared in the matter until well after the settlement had been fully negotiated and had been "retained" by Ms. Grubbs without the knowledge or consent of Ms. Green. How could the unilateral act of Ms. Grubbs bind the estate, with respect to Mr. Dorsey, yet the combined acts of Ms. Grubbs and Mrs. Green be invalidated merely because they signed two pieces of paper rather than one?

Petitioner submits that the court's ruling with respect to attorney fees is not only clearly erroneous, it so palpably intended to frustrate the original intent of the parties and the controlling state law, that it represents a clear abuse of federal authority by the court.

In *People of Sioux County Neb. v. National Surety Co.*, 276 U.S. 238 (1928) this Court held that in a case removed to federal court, the issue of attorney fees involves a question of substantive law and as such the state law on the subject controls. This court stated:

> [I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. *It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the case to the federal courts.*

(Emphasis added). (*See also Alyeska Pipeline Service, Co. v. Wilderness Society*, 421 U.S. 240, 259 n.31 (1975)).

While *Sioux County* and *Alyeska Pipeline* addressed a plaintiff's state law right to recover attorney fees as part of a judgment enhancement, this court's rationale is no less compelling when applied to the attorney fee issue in this case.

III. WHETHER DISQUALIFICATION SHOULD BE REQUIRED WHEN THE JUDGE ASSUMES THE ROLE OF AN ADVOCATE IN THE CASE?

Throughout the pendency of this matter, in statements made both in informal conferences with attorneys and in the court's orders, the district judge in the court below advocated the need for procedures and conditions to settlement approval not required by the Wrongful Death Act, advocated on behalf of persons not protected by the statute, and advocated for latitude to impose a result not permitted by the statute. He sought to subject the settlement to public and media scrutiny which was to in turn lead to public debate as a prerequisite to settlement approval, when such procedures are not prescribed by the Act. He openly stated that he was acting for the protection of City of Detroit taxpayers, when the Wrongful Death Statute does not describe their interests as being within the scope of its protections. He insisted that he be given the latitude to impose a "rebate" of "excess" monies, when such authority is not derived from the statute.

In becoming an advocate of extra-statutory matters, the judge became an adversary of the parties who sought only to have the permissibility of their settlement reviewed in the manner intended by the statute. As an adversary, the judge forced the parties to contend on a field which was anything but level.

Petitioner submits that the function of the judge is to fairly

and impartially consider all arguments and to apply the controlling law, regardless of the judge's personal predilections. By contrast the role of the advocate is to advance his or her positions through arguments which proffer interpretations of law which favor those positions. Petitioner submits further that these clearly distinguishable functions are so incompatible that the assumption of one is the surrender of the other.

In the case at bar, the judge not only actively advocated the interposition of conditions, procedures and results which were not prescribed by the Wrongful Death Statute, he also actively worked to defeat all opposing propositions and/or arguments of law and fact which supported these views. He used his power as a judge not to further the mutual interests of the parties to settle their case, but to advance his views as to what form and in what amount the settlement should be permitted. He used the awesome influence of his office not to assess the legal permissibility of the settlement, but as leverage to force the attorneys to succumb to modifications of the settlement he alone wanted to impose.

The Petitioner filed the third of three separately filed motions which sought the district judge's disqualification. The motion, like one brought by another attorney, was brought pursuant to 28 U.S.C. § 144 as well as 28 U.S.C. § 455, and was supported by an affidavit setting forth specific instances of the judge's resort to threats, intimidation and divisiveness to force acquiescence in his plan to proceed, used inaccurate recitations of fact upon which to base his rulings and selectively disregarded legal arguments which were inconsistent with his plan, rendered decisions on issues before the parties were permitted such fundamental requirements of due process as notice of the issue and a meaningful opportunity to be heard and repeatedly intruded upon the relationships between lawyers and their respective clients.

The judge denied all three of the motions seeking his

disqualification, without hearing and without forwarding them to another judge for disposition. In the lone exception in which the judge responded to a specific allegation of bias, the judge cited a newspaper article to support his conclusion that the attorney had disavowed his own allegation of bias. The judge made no inquiry into the accuracy of the quote or the context in which it may have been offered. He also made no effort to otherwise address that specific allegation of bias.

28 U.S.C. § 144 requires that upon the filing of a motion thereunder that the judge "shall proceed no further, but another judge shall be assigned to hear such proceeding". The judge in this matter avoided this requirement by citing the extra-judicial source rule.

Although Petitioner submits that the judge indeed developed his biases from extra-judicial sources, he submits further that an exception to that rule should be made in cases in which the judge has so clearly revealed his bias by stepping down from his role as a neutral arbiter of the law and assuming the role of an advocate in the matter.

When this Court adopted the extra-judicial source rule in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) it did so to prevent abuses by parties who might otherwise seek to disqualify judges in matters in which they were displeased by rulings of the court. *United States v. Devine*, 934 F.2d 1325 (5th Cir. 1991) is but one in a line of cases which has interpreted the rule to require that the alleged bias of the judge be "personal" rather than "judicial" in nature.

When a judge becomes an advocate, however, he is revealing a bias which clearly derives from a "personal" rather than a "judicial" investment. As such, regardless of how the bias is triggered, it so clearly impairs the judge's willingness or ability to

be fair and impartial that disqualification of the judge is the only remedy which can insure that an injustice will not occur.

In the court below, the judge's use of media interest in this matter to ambush the lawyers and to chill their exercise of independent professional judgment on behalf of their respective clients, standing alone, speaks volumes about the bias in favor of the things he advocated and against those who opposed his views.

Such a readily apparent bias should not be shielded by the extra-judicial source rule and permitted to taint the process or to skew the results.

Accordingly, it is submitted that certiorari should be granted so that this Court may determine whether a judge's assumption of the role of the advocate requires disqualification, as an exception to the extra-judicial source rule.

CONCLUSION

For the foregoing reasons Petitioner respectfully subjects that certiorari should be granted in this matter.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED APRIL 29, 1997

Nos. 95-1940/1941

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROSE MARY GREEN, Personal Representative of the Estate of Malice Wayne Green, Deceased,
Plaintiff-Appellee,

JESSIE GREEN, JR.; OLLIE FRYE; KIM NIHISER, as Mother and Next Friend of Jacqueline Dennison, a minor; PEGGIE WRIGHT; FIRST BUSEY TRUST & INVESTMENT COMPANY, as guardian of the Estate of Jacqueline Dennison; SHAKIETA STRAWTER; LACHITA MILLER; EDNIQUECH GRUBBS; PATRICIA GREEN; TREISE GREEN; SHERRY GREEN, ROSE MARY GREEN; and MONICA GREEN,
Claimants-Appellees,

ERNEST L. JARRETT (95-1940); BRUNETTA BRANDY (95-1941), Attorneys,
Movants-Appellants,

ON APPEAL from the United States District Court for the Eastern District of Michigan

Appendix A

v.

LARRY NEVERS, et al.,
Defendants.

Decided and Filed April 29, 1997

Before: LIVELY, MERRITT, and DAUGHTREY, Circuit Judges.

LIVELY, Circuit Judge. Malice Green died on November 5, 1992, allegedly as the result of a beating by Detroit police officers. Four days later attorney Brunetta Brandy, now an appellant, filed a wrongful death action in a Michigan state court in the name of Rose Mary Green, widow and personal representative of Malice Green's estate. Within less than one month the City of Detroit offered to settle the case for $5.25 million. Now, more than four years later, two of the many lawyers involved in the case are contesting the amount and division of the district court's attorney fee award. It is time to bring an end to this unseemly spectacle.

I.

The caption of the complaint filed in state court showed only Rose Mary Green as the plaintiff. Following removal of the case to federal court, where it was assigned to Judge Gerald Rosen, however, attorney Gerald Thurswell appeared on behalf of Malice Green's oldest daughter, Edniquech Grubbs. Although Thurswell stated that Ms. Grubbs had been appointed co-personal representative with Mrs. Green, he did not file a copy of the order appointing Ms. Grubbs with the document.

Appendix A

After an abortive attempt by attorney Brandy to dismiss the action pursuant to FED. R. CIV. P. 41(a)(1)(i), the attorneys then on record as representing the parties, including the defendant City of Detroit, advised the court that they desired to place a settlement agreement on the record. The attorneys also sought to seal the record, but the court denied this request noting the widespread publicity and interest in the case. Disturbed by the fact that the settlement agreement provided for payment of $1.7 million in attorney fees even though very little legal work had been performed, the court directed counsel to file affidavits relating to the amount of work performed by each attorney in the case. To clear the record concerning the attempted dismissal, the parties stipulated to reinstate the case. All of these steps had been taken by December 28, 1992, less than two months after Malice Green's death.

Shortly thereafter, attorney Thurswell, who represented several individual claimants as well as Ms. Grubbs as co-personal representative, advised the court that he had been dismissed by several of the claimants and he filed a motion to withdraw as counsel for all of his clients. The court set a hearing on the motion to withdraw for January 11, 1993. During the next week, attorney Justin Ravitz filed an appearance on behalf of Malice Green's parents and three sisters and a later appearance on behalf of Ollie Frye, the decedent's maternal grandmother. Although he did not file a formal notice of appearance until January 14, 1993, attorney Joseph Phebus notified the court at about the same time that he would be representing Kim Nihiser, the mother and next friend of Jacqueline Dennison, a minor child of the decedent.

On January 7, 1993, attorney Brandy filed a notice of appearance as co-counsel for Edniquech Grubbs, for whom attorney Thurswell had previously appeared, and a stipulation to dismiss under FED. R. CIV. P. 41(a)(1)(ii) signed by John Quinn, an attorney for the City of Detroit, and Ms. Brandy as "attorney for plaintiff." Judge Rosen met with all counsel on January 11, 1993. At that time, the attorneys advised the court that the proposed settlement

had broken down but that the parties wished to pursue further negotiations. When the court inquired about the pending stipulation to dismiss, attorneys Ravitz and Phebus stated that they had not signed, and indeed objected to, the stipulation. On January 14, 1993, attorney Phebus filed a formal objection to the dismissal, contending that dismissal would jeopardize Jacqueline Dennison's rights.

On January 15, 1993, attorney Saunders Dorsey filed an appearance on behalf of Edniquech Grubbs, in her representative capacity, and on February 1, attorney Jerome Barney filed an appearance on behalf of Edniquech Grubbs, also in her representative capacity. On that same date the City of Detroit filed a motion to dismiss arguing that it was protected by governmental immunity.

The court granted Mr. Thurswell's motion to withdraw as attorney for Edniquech Grubbs and others on March 4, 1993, and issued a notice setting a scheduling conference for March 25, 1993. The notice directed the attorneys to be prepared to discuss several aspects of the case, including the court's subject matter jurisdiction. Prior to the scheduling conference, the court was advised that the parties had reached a final settlement with the city for $5.25 million allocating different amounts to each of the claimants and $1.2 million to the attorneys for the estate. At the scheduling conference, counsel for the estate advised the court of their position that the court no longer had jurisdiction because of the stipulated dismissal and that they intended to proceed in probate court. The court invited briefing on its jurisdiction, and several parties filed briefs addressing the issue. On April 13, the court entered an order finding the stipulation to dismiss ineffective and retaining jurisdiction.

After unsuccessful motions by various counsel for reconsideration, to proceed in probate court, and to disqualify the judge, the court entered a consent judgment on July 18, 1994. This document granted judgment in the amount of $5.25 million in favor of the estate and against the City of Detroit only, the individual defendants never

having been served. The court conducted a hearing on the distribution of the $5.25 million on October 21, 1994. At that time, the court also heard arguments on several jurisdictional issues. On November 7, 1994, the court issued an opinion denying the various motions to dismiss, clarifying the distribution of settlement proceeds, determining that no valid contingent fee agreement existed, and withholding determination of the issue of attorney fees. At the same time, the court also entered a separate order directing partial payment of the settlement proceeds to the claimants. After the dismissal of an appeal and petition for a writ of mandamus concerning the November 7, 1994 rulings, the court reviewed the affidavits, briefs, and supplemental information submitted by attorneys Brandy, Jarrett, and Dorsey and entered an order setting the amount of attorney fees for each on July 28, 1995.

Having previously found that none of the attorneys had binding contingent fee agreements with the Malice Green estate, the court considered the amount of fees they would be entitled to receive from the estate on a *quantum meruit* basis. Applying the factors listed in Rule 1.5(A) of the Michigan Rules of Professional Conduct, the court awarded fees as follows: Ernest Jarrett, who worked with Attorney Brandy under a "fee sharing agreement," $250,000; Brunetta Brandy, $173,000; Saunders Dorsey, who represented Rose Mary Green individually, $170,000. This order also directed the distribution of the remaining settlement proceeds, which had been escrowed awaiting determination of fees.

II.

This court consolidated attorney Brandy and Jarrett's separate appeals. The prolix arguments of the appellants boil down to four issues:

(1) Whether the district court had subject matter jurisdiction;

(2) Whether the case should have been dismissed pursuant to Rule 41;

(3) Whether the district court erred in rejecting the contingent fee agreement and setting the amount of attorney fees;

(4) Whether Judge Rosen should have disqualified himself.

We discuss these issues in the order listed.

A.

The attorney-appellants assert that the district court lacked subject matter jurisdiction over this wrongful death action, contending that the complaint alleged no federal claims against the City of Detroit. Review of the complaint belies the appellants' contention. Count IV of the complaint alleges that the City of Detroit's police department and chief of police "permitted, encouraged, tolerated and ratified a pattern and practice of unjustified, unreasonable, and excessive force by police officers." The complaint further alleges that the City of Detroit "has maintained no system of review or has failed to identify instances of improper use of force or to discipline, more closely supervise, or retrain specific officers who in fact improperly used such force," and that "[t]he foregoing acts, omissions, and systematic deficiencies are policies and customs" of the city. As the district court noted, the allegations in Count IV are sufficient to state a claim for relief under 42 U.S.C. § 1983. See *City of Canton v. Harris*, 489 U.S. 378 (1989); *Monell v. Dep't of Social Services*, 426 U.S. 658 (1978). In addition, Count V of the complaint specifically alleges deprivation of federal constitutional rights and incorporates all of the allegations in the previous counts. Thus, the case was properly removed based upon the federal claims appearing on the face of the complaint, which alleged causes of action over which the district court would have had original jurisdiction. The district court also properly exercised supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a) because these claims arose from the same occurrence that formed the basis of the federal claims.

Appendix A

B.

As noted, on January 7, 1993, attorney Brandy, representing Mrs. Green as personal representative of the Malice Green estate, and attorney Quinn, representing the City of Detroit, filed a "Stipulation to Dismiss Action without Prejudice and without Costs." The stipulation stated that the "[t]he plaintiff and the defendant City of Detroit, the only defendant that has been served, stipulate to entry of the dismissal pursuant to FRCP 41(a)(1)." After substantial briefing, the district court noted that courts addressing Rule 41(a)(1)(ii) motions "have routinely looked to `parties in interest' beyond those named in the case caption." The court then rejected the argument that the co-personal representatives were the only "parties who have appeared in this case," and found the putative stipulation defective because "all the parties who have appeared in the action" did not sign the stipulation. Alternatively, the court also found that counsel, by their actions, had waived the right to a Rule 41(a) dismissal. The court also stated that it exercised its inherent power to deny dismissal. We need not consider the waiver argument, as we conclude that the district court correctly found that the motion was not signed by all the parties who had appeared in the action and acted well within its inherent power in refusing to permit dismissal under the circumstances of this case.

Rule 41(a)(1) provides, in pertinent part:

> (a) Voluntary Dismissal: Effect Thereof.
>
> (1) By plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal *signed by all parties who have appeared in the action*. (emphasis added).

Appendix A

At the time the January 7, 1993 stipulation was filed, the following attorneys had entered appearances: Brunetta Brandy, attorney for personal representative Rose Mary Green; Ernest L. Jarrett, co-counsel for personal representative Rose Mary Green; Gerald Thurswell, attorney for Edniquech Grubbs and several claimants; Justin Ravitz, attorney for the decedent's parents, three sisters, and maternal grandmother; John P. Quinn, attorney for the City of Detroit; Brenda Braceful, attorney for the City of Detroit. An additional attorney, John Phebus, had contacted the court regarding his representation of Kim Nihiser, mother and next friend of Jacqueline Dennison, a minor child of the decedent. Mr. Phebus filed a formal notice of appearance on January 14, 1993. Although Ms. Brandy claims to have been the attorney for Edniquech Grubbs at the time the stipulation was filed, Mr. Thurswell's motion to withdraw as counsel had not yet been granted and he was still Ms. Grubbs's counsel of record.

Attorneys Brandy and Jarrett contended that because Ms. Brandy represented the estate and Mr. Quinn the city, the stipulation was signed by all the parties. Rejecting this argument, the district court looked beyond the case caption and considered the next of kin who would share in a wrongful death judgment or settlement to be "parties who had appeared in the action" because of their interest in the outcome of the case and inability to assert their claims on their own behalf. Inasmuch as the attorneys representing their interests did not sign the stipulation and because Mr. Thurswell did not sign, the court determined that the stipulation did not effect a Rule 41(a)(1) dismissal. The court rejected the argument that because only a personal representative may bring an action for wrongful death under Michigan law, M.C.L.A. § 600.2922(2), the heirs and next of kin of Malice Green were only "interested persons," not proper parties in the removed action. As stated, we agree with the district court's ruling and reasoning.

The appellants also challenge the district court's resort to its inherent power in refusing to give effect to the stipulated dismissal. They contend that Rule 41(a)(1), unlike Rule 41(a)(2), which contemplates the exercise of judicial discretion and requires a court order to effectuate dismissal, operates automatically and allows parties to withdraw an action from federal court for any reason. While a properly stipulated dismissal under Rule 41(a)(1)(ii) is self-executing and does not require judicial approval, *Aamot v. Kassel*, 1 F.3d 441, 445 (6th Cir. 1993); *Hinsdale v. Farmers Nat'l Bank & Trust Co.*, 823 F.2d 993, 995-96 (6th Cir. 1987), a court may decline to permit a voluntary dismissal when required to avoid short-circuiting the judicial process, or to safeguard interests of persons entitled to the court's special protection. Thus, a "court, exercising its inherent powers, may look behind it [a settlement] to determine whether there is collusion or other improper conduct giving rise to the dismissal." *United States v. Mercedes-Benz of North America*, 547 F. Supp. 399, 400 (N.D. Cal. 1982). See also *Thomsen v. Terrace Navigation Corp.*, 490 F.2d 88 (2d Cir. 1974) (court has inherent power to vacate a voluntary discontinuance where counsel dismissed an action without client's consent); *Crawford v. Loving*, 84 F.R.D. 80, 87 (E.D. Va. 1979) (a construction of Rule 41(a)(1)(ii) depriving "a person under a disability of the protection of the Court is highly unjust" and should not be followed).

At least one claimant--Jacqueline Dennison--was a minor and thus under a disability, and her attorney did not sign the stipulation. Even if the attorney had signed the stipulation on behalf of Jacqueline's mother and next friend, the court would have been remiss if it had not made an independent determination that the settlement was in the minor's best interest. *Crawford v. Loving* is persuasive. That case involved the settlement of a civil rights action brought under 42 U.S.C. § 1983 by a state prisoner against prison officials. The prisoner was legally incompetent and his next friend joined with the defendants in a stipulated dismissal pursuant to Rule 41(a)(1)(ii). In refusing to give effect to the stipulation, the court stated:

> Logic joins the law in compelling the conclusion that an incompetent person's suit cannot be ended upon settlement followed by the filing of a stipulation of dismissal. It is only when a settlement occurs that the Court's duty to oversee the settlement arises. If that duty could be aborted by the filing of a stipulation, the role of the Court would be effectively avoided. Neither law nor logic sanction such a result.

84 F.R.D. at 87.

Beyond these considerations is the fact that the Michigan Wrongful Death Act requires a settlement to be approved by the trial court as a safeguard to protect the interests of the claimants. M.C.L.A. § 600.2922(5). The "named" parties should not be permitted to circumvent the approval process by stipulation. The district judge's refusal to give legal effect to the stipulation, when he was aware that at least two attorneys, Phebus and Ravitz, one of whom represented a minor claimant, had voiced objection to the stipulation on behalf of their clients was entirely proper.

We conclude that the district court did not abuse its broad discretion and properly exercised its inherent power to determine whether the stipulation of dismissal should be given effect.

C.

Attorneys Brandy and Jarrett argue that the district court was bound to award them an attorney fee of one-third of the estate's recovery in accordance with a contingent fee agreement. They rely on the fact that three days after Malice Green's death, Ms. Brandy wrote separate letters to Mrs. Green and Ms. Grubbs outlining the terms of her representation and that each of the addressees signed one of the letters acknowledging and agreeing to the terms. Neither letter specifically referred to the addressee as a personal representative of the estate. Rather, the letters appear to have been addressed to Mrs. Green and to Ms. Grubbs individually and to have been acknowledged and agreed to by them as individuals rather than as personal

representatives. Since both addressees would have shared individually in any recovery by the estate as widow and daughter of the decedent, the letter agreements on their face do not bind the estate. The letters refer to a fee computed "on the net sum recovered by you." Nothing in the letters indicates that the estate is to pay Ms. Brandy a fee.

Even if the letter to Ms. Grubbs is construed as referring to her as an estate representative, it raises several questions. In the first place, the complaint recites that Rose Mary Green was the duly appointed personal representative of the estate. She is the only plaintiff and only personal representative named in the complaint; there is no mention of Ms. Grubbs. Further, when Ms. Grubbs first surfaced as "co-personal representative," her appearance was entered by Mr. Thurswell, not by Ms. Brandy. If Ms. Grubbs was appointed co-personal representative at the time the complaint was filed, she should have been a plaintiff. If she had not been appointed at that time, the agreement that she signed as co-personal representative was a nullity.

Faced with these discrepancies and noting the obvious haste with which attorney Brandy moved, the court naturally proceeded cautiously in dealing with the fee agreement. Further, although the court was aware of only one minor claimant at the time it rejected the contingent fee agreement, before the distribution order was entered two other minor claimants--grandchildren of Malice Green--had appeared. Because Michigan law requires co-personal representatives to act jointly to bind an estate, *Action Auto, Inc. v. Anderson*, 165 Mich. App. 620 (1988), and the co-personal representatives did not jointly sign any fee agreement, the court found no valid fee agreements between the estate and any lawyer.

There are many reasons for upholding the district court's rejection of the contingency fee agreement. In the first place, it is not at all clear that the co-personal representatives acted jointly, a requirement of Michigan

law, in attempting to bind the estate to a contingent fee agreement. More compelling, however, is the rule that a contract for contingent fees "should always be subject to the supervision of a court, as to its reasonableness." *Krause v. Rhodes*, 640 F.2d 214, 219 (6th Cir.), *cert. denied*, 454 U.S. 836 (1981). Courts have broad authority to refuse to enforce contingent fee arrangements that award excessive fees. A fee can be unreasonable and subject to reduction without being so "clearly excessive" as to justify a finding of breach of ethical rules. *McKenzie Const., Inc. v. Maynard*, 758 F.2d 97, 100 (3rd Cir. 1985). Moreover, "[w]hen a court is called on to approve . . . [a settlement involving a minor], it must consider and then determine what constitutes fair and reasonable compensation to the attorney regardless of any agreement specifying an amount, whether contingent or otherwise." *Dean v. Holiday Inns, Inc.*, 860 F.2d 670, 673 (6th Cir. 1988). Minors' interests are subject to the court's protection. *Id.*; *Centrala v. Navrude*, 30 Mich. App. 30, 32-33 (1971).

The court in *Krause v. Rhodes*, also an action under 42 U.S.C. § 1983, described the trial court's authority to fix attorney compensation and prescribed a limited standard of review:

> A federal district judge has broad equity power to supervise the collection of attorneys' fees under contingent fee contracts. As has often been stated,
>
> > where an attorney recovers a fund in a suit under a contract with a client providing that he shall be compensated only out of the fund he creates, the court having jurisdiction of the subject matter of the suit has power to fix the attorney's compensation and direct its payment out of the fund.
>
> *Garrett v. McRee*, 201 F.2d 250, 253 (10th Cir. 1953), *quoted in Cappel v. Adams*, 434 F.2d 1278, 1279 (5th Cir. 1970). Further, "[t]he sum determined to be a reasonable attorney's fee is within the discretion of the district court; before a reviewing court should disturb the holding there should be a clear

> showing that the trial judge abused his discretion." *Cappel v. Adams*, *supra*, at 1280. Thus, an attorney's right to contract for a contingent fee is not completely beyond judicial control.

640 F.2d at 218 (footnote omitted). See also *United States ex rel. Taxpayers Against Fraud v. General Electric*, 41 F.3d 1032, 1047 (6th Cir. 1994) ("an attorney's right to contract for a contingent fee is not completely beyond judicial control." (quoting *Krause*)); *Kalyawongsa v. Moffett*, 105 F.3d 283, 286 (6th Cir. 1997) ("federal district `judges have broad equity power to supervise the collection of attorneys' fees under contingent fee contracts.'" (quoting *Krause*)).

In its order setting the appellants' fees the district court applied the factors set forth in the Michigan Rules of Professional Conduct and carefully analyzed each factor in light of the information furnished by the appellants. Neither appellant supplied the court with detailed records of the time spent on the case. Ms. Brandy claimed she spent 60% of her time on the case between November 1992 and August 1993. The district court gave her the benefit of that estimate, crediting her with 865 hours. Mr. Jarrett was "confident that [he] devoted hundreds, perhaps as many as 1,000 hours, to the case." The district court credited him with 700 hours. Despite this generous treatment of very sketchy demonstrations of hours expended, the appellants make multiple arguments that the fees awarded are too low. We disagree.

The record reflects that the City of Detroit offered the $5.25 million settlement less than three weeks after the filing of the complaint, motivated, at least in part, by the public outcry attendant to the death of Malice Green. The estate achieved a valuable result for Malice Green's survivors, but that value arose more from the notoriety of the case than from the effort of either Mr. Jarrett or Ms. Brandy. Attorney Brandy argues that the district court erred in finding that the case presented no novel or difficult questions of law relating to the City's municipal liability.

This contention is patently meritless given a wealth of Supreme Court cases relating to the issue, the frequency with which police brutality suits are brought, and the City of Detroit's quick settlement offer.

The appellants have completely failed to demonstrate that the district court abused its discretion either in rejecting the contingent fee agreement or in setting the amount of *quantum meruit* attorney fees to be paid from the settlement.

D.

Several of the attorneys made motions at various stages of the proceedings seeking to have Judge Rosen disqualify himself. They relied on both 28 U.S.C. § 144 and 28 U.S.C. § 455.[1]

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[1] 28 U.S.C. § 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such a time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 455 provides:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such

Judge Rosen, noting that §§ 144 and 455 are to be read *in pari materia*, *Easley v. University of Michigan Board of Regents*, 853 F.2d 1351, 1355 (6th Cir. 1988), and that motions brought under both sections are entrusted to the sound discretion of the trial court, *In re M. Ibrahim Khan, P.S.C.*, 751 F.2d 162, 165 (6th Cir. 1984), found that he was not required to transfer the motions to another judge and that the motions were wholly without merit. The court observed that disqualification under both § 144 and § 455 must be predicated "upon extrajudicial conduct rather than on judicial conduct," *United States v. Story*, 716 F.2d 1088, 1091 (6th Cir. 1983)(*quoting City of Cleveland v. Krupansky*, 619 F.2d 576, 578 (6th Cir.), *cert. denied*, 449 U.S. 834 (1980)), and upon "a personal bias `as distinguished from judicial one,' arising `out of the judge's background and association' and not from the `judge's view of the law.'" *Id.* at 1090 (*quoting Oliver v. Michigan State Board of Education*, 508 F.2d 178, 180 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975)). The court also found one of the motions to be untimely.

We agree with the district court's conclusions. There is no evidence of bias in this record. There is evidence of impatience with attorneys whose legal work was at times shoddy, and who spent a great deal of time quarreling among themselves. The court also displayed a natural skepticism when asked to seal the record of a case in which the city offered to pay a large sum of money within a few weeks of the incident giving rise to the lawsuit before conducting any discovery. This skepticism was further aroused by the fact that the proposed settlement, reached at

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lawyer has been a material witness concerning it . . . .

a time when the only legal work by plaintiff's counsel consisted of an unexceptional complaint, provided for an attorney fee of $1.7 million to be paid to Ms. Brandy and her fee-sharing associate, Mr. Jarrett.

The conclusory and unsubstantial allegations in the motions to disqualify Judge Rosen required no action other than the response given in the orders denying these motions.

The judgment of the district court is **AFFIRMED.**

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED JULY 28, 1995

UNITED STATES DISTRICT COURT EASTERN
DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 92-CV-76881-DT

Hon. Gerald E. Rosen

ROSE MARY GREEN and EDNIQUECH GRUBBS, Co-Personal Representatives of the Estate of MALICE WAYNE GREEN, Deceased,

Plaintiff,

vs.

CITY OF DETROIT,

Defendant.

OPINION AND ORDER DETERMINING AMOUNT OF FEES TO BE PAID TO ATTORNEYS BRANDY, JARRETT AND DORSEY, AND ORDER DISBURSING REMAINDER OF ESCROWED SETTLEMENT FUNDS

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on July 28, 1995

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. INTRODUCTION

On November 7, 1994, this Court entered an "Opinion and

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Order re: Distribution of Settlement Proceeds and Attorneys' Fees" in which the Court determined that attorneys Brunetta Brandy, Ernest Jarrett and Saunders Dorsey did not have valid binding contingent fee agreements with the Estate of Malice Green so as to entitle them to one-third of the total monetary settlement of this wrongful death action, an amount of $1.2 million.

With Respect to Ms. Brandy and Mr. Dorsey, the Court found that neither of these attorneys had valid contingent fee/ retainer agreements with the Estate because the co-personal representatives appointed by the probate court, Rose Mary Green, the decedent's wife, and Edniquech Grubbs, the decedent's oldest daughter, did not jointly execute any agreement retaining either Ms. Brandy or Mr. Dorsey to represent the Estate of Malice Green. To the extent that Ms. Green and Ms. Grubbs had, at one time, separately retained Ms. Brandy, their separate retainer agreements made no reference to Ms. Brandy's representation of either of them in their representative capacities as co-personal representatives of the decedent's estate, and were executed only in their individual capacities, not in their co-personal representative capacities. Thus, the Court found that there is no valid signed agreement with the estate. The Court further found that even if there were at the beginning a valid agreement, once Ms. Grubbs discharged Ms. Brandy and hired Mr. Dorsey, the co-personal representatives were no longer acting jointly as required by law.

With respect to Mr. Jarrett, it was undisputed that he never had any contingent fee or retainer agreement with either Ms. Green or Ms. Grubbs. However, Jarrett claimed to have had a "fee sharing" arrangement with Ms. Brandy for a share of her 1/3 contingent fee. Notwithstanding the invalidity of Ms.

Brandy's contingent fee agreement, the Court found that Jarrett's and Brandy's "fee sharing" arrangement was invalid because Ms. Grubbs did not consent and expressly objected to Jarrett's participation. Consequently, under applicable law, the fee sharing agreement was rendered void.

Because the Court determined that Ms. Brandy, Mr. Jarrett and Mr. Dorsey did not have valid contingent fee agreements, as the Court explained in its November 7, 1994 Opinion and Order, they are entitled to compensation for the work they did on this case based upon *quantum meruit*, i.e., the reasonable value of the services rendered. The Court previously had directed the attorneys to provide verified fee affidavits and then subsequently permitted them to supplement the record and provide additional information as to the value of their services.

The Court has reviewed and considered the affidavits, briefs and supplemental information submitted by attorneys Brandy, Jarrett and Dorsey concerning their work on this case and the fees sought. Now that the untimely appeal and mandamus petition concerning the Court's November 7, 1994 rulings have been dismissed by the Sixth Circuit and jurisdiction re-established in the district court, the Court is now prepared to rule on the amount of fees to be paid to these three attorneys. This Opinion and Order sets forth that ruling.

II. DISCUSSION

In deciding the reasonable value of an attorney's services, Michigan courts generally use the factors set forth in Rule 1.5(A) of the Michigan Rules of Professional Conduct, which provides in pertinent part:

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The factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputations, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

MRPC 1.5 (A). *See also*, *Crawley v. Schick*, 48 Mich. App. 728, 211 N.W.2d 217, 222 (1973) (applying the standards of Michigan

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Code of Professional Responsibility § 2-106(B), the predecessor of the Rule 1.5(A) of the Michigan Rules of Professional Conduct).[1]

Since the *Crawley* decision, numerous Michigan courts have applied these factors in determining the reasonableness of attorney fees in a variety of contexts, including cases involving personal injury and wrongful claims. *See e.g., Wood v. DAIIE*, 413 Mich. 573, 321 N.W. 2d 653, 661 (1982); *Michigan Tax Mgt. Services v. Warren*, 437 Mich. 506, 473 N.W. 2d 263 (1991); *Smolen v. Dahlmann Apartments, Ltd.*, 186 Mich. App. 292 (463 N.W. 262 (1990); *Bloemsma v. Auto Club Insurance Association*, 190 Mich. App. 686, 476 N.W. 2d 487, 488-498 (1991); *In re Martin*, 205 Mich. App. 96, 517 N.W. 2d 749, 754-755 (1994); *Department of Transportation v. D & T Construction Co.*, __ Mich. App. __, 530 N.W. 2d 183, 185-186 (1995).

In determining fees, although the actual amount requested may be considered, it is not, in and of itself, controlling. *In re Martin, supra*, 517 N.W.2d at 755; *Department of Transportation v. D & T Construction Co, supra* ("While a contingent fee agreement may be considered by the court in its efforts to determine a reasonable fee award, it does not eliminate the need for the court to consider also the other factors, including the extent of services actually performed." 530 N.W. 2d at 186). The burden of proof with regard to reasonableness rests on the party claiming a right to compensation. *In re Martin, supra*, 517 N.W.2d at 755.

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1. The Court notes that these standards are virtually identical to the standards applied in deciding federal civil rights fee awards under 42 U.S.C. § 1988, as delineated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

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While the cases make clear that the trial court should consider the *Crawley* guidelines, they also make clear that the court is not limited to those factors in making its decision. *Wood v. DAIIE, supra*; *Bloemsma v. Auto Club Ins., supra*; *Smollen v. Dahlmann Apartments, supra.* The cases emphasize that in reaching its determination, the court is to take into account "the totality of the circumstances" applicable to the particular case before it. *Smollen v. Dahlmann Apartments, supra,* 463 N.W. 2d at 264. *See also, Crawley v. Schick, supra* (the reasonableness of attorney fees must be determined "in light of the particular facts of each case." 211 N.W.2d at 222.)

The Court will apply the foregoing factors in determining the amount of the fees to be paid to attorneys Brandy, Jarrett, and Dorsey in this case.

A. THE TIME AND LABOR REQUIRED

As an initial matter, it should be noted that neither Ms. Brandy nor Mr. Jarrett nor Mr. Dorsey kept contemporaneous time records in this case. In their affidavits, however, the three attorneys have, in varying degrees of detail, set forth summaries of the work they did in connection with this matter.

Ms. Brandy states that she worked on this matter from November 1992 through February 1993, and that in June through August 1993, she "monitored and attended the criminal trial" [presumably of the individual police officers who were originally named (but never served) as defendants in this civil action].[2]

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2. Ms. Brandy's affidavit states only the following with respect to "legal services rendered" by her in this case: *Nov. 1992* — consultation with clients, Edniquech Grubbs, Rose Green, Kim Nihiser; preparation of complaint; (Cont'd)

She does not, however, give an estimate of the number of hours she spent on this case other than to indicate that from November 1992 through August 1993 she devoted "over sixty (60%) percent of my legal expertise, professional ability and services exclusively to this case." [Brandy Affidavit, p. 6.]

It was Ms. Brandy who commenced this action. However, approximately one week after filing the complaint, Mr. Jarrett became involved in this case [Jarrett Affidavit p. 2], and, as the Court noted at the November 7, 1994 hearing, it was Mr. Jarrett who did the bulk of the substantive work thereafter.

(Cont'd)

preparation of request for production of documents; preparation of plaintiff's ex-parte petition for discovery; preparation of notice of wrongful death complaint to interested claimants; preparation of petition for commencement of proceedings; consultation with probate specialist; receipt and review of taped TV clips of City officials; preparation of motion to stay proceedings; daily extensive negotiations with City corporation counsel; review of proposed structured settlement and fair market value. *Dec. 1992* — continuous extensive negotiations with City corporation counsel; settlement agreement; motion for approval of settlement; motion to strike appearances of interested parties and heirs-at-law; stipulation to dismiss action in U.S. District Court; appearance in court before Judge Stacey; stipulation for substitution of counsel for co-personal representative; review of correspondence by attorneys for interested parties and court; stipulation to extend time for City of Detroit to answer complaint. *Jan., 1993* — appearance of cocounsel for co-personal representative; review of revised proposed structured settlement agreements; continued negotiations with corporation counsel for City; review of affidavit from Gerald Thurswell terminating representation for co-personal representative; motion to withdraw by Gerald Thurswell; meetings with all attorneys for interested parties; review of correspondence between attorneys for interested parties, heirs and court objecting to entry of settlement. *Feb., 1993* — research – probate law; research – wrongful death statute; research – real party in interest; conference; research of jurisdiction after dismissal of case; research for writ of mandamus. *Jun., 1993 — Aug., 1993* — monitored and attended criminal trial. [Brandy Affidavit, pp. 1-4.]

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Mr. Jarrett states in his affidavit that he is "confident that [he] devoted hundreds, perhaps as many as 1,000 hours, to this case." [Jarrett Affidavit p. 26.] He further estimates that "from November 1992 through August 1993, this case very easily exceeded 50% and perhaps more, of all of the time I devoted to all other professional endeavors combined." *Id.* at p. 27.[3] In two pages of his Affidavit, Mr. Jarrett provides a narrative of the work he did on this case. [*See* Jarrett Affidavit, pp. 6-25.]

Mr. Dorsey did not get involved in this case until January 1993. [See Dorsey Supplemental Petition for Attorney Fees and Affidavit.] He estimates that he spent "minimally over 375 and potentially over 425 hours" on this case. *Id.* at p. 16. Dorsey also has provided a summary of the work done on this matter. [*See* Dorsey Affidavit.]

An examination of the summaries provided by the three attorneys and of the court's docket of this matter, however, indicates that other than settlement negotiations and client meetings, virtually no substantive litigation work was done on this case. The case was actually never really placed "in controversy". No answer was ever filed by the Defendant.[4] Minimal discovery was done, and this was at the very commencement of the action.[5] The City made its settlement offer

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3. He adds that even after August 1993, particularly during the period between February and April 1994, this case dominated his time. [Jarrett Affidavit, p. 27.]

4. Defendant did file a Motion to Dismiss more than four months after the Complaint was filed. Plaintiffs never filed a response to that Motion.

5. The court docket of this matter indicates that, although this case has been "open" for nearly three years, no activity occurred for nearly 12 months due to Mr. Jarrett's filing of mandamus petitions and premature appeals with the Sixth Circuit.

within 10 days of the filing of the Complaint, and from then on, the only substantive legal work done by the lawyers was in contesting this Court's jurisdiction over this matter and in disputing the Court's authority to review attorney fees.[6]

B. NOVELTY AND DIFFICULTY OF THE QUESTIONS INVOLVED

The novelty/difficulty inquiry focuses on the legal questions presented by the case. All three of the attorneys claim that this case presented very difficult and novel legal questions. Ms. Brandy states that the novelty and difficulty lies in establishing "the City's responsibility and liability as a municipality through negligent training and supervision" of the police officers involved in this case. A review of this Court's docket demonstrates the lack of merit in this assertion. Police brutality

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6. Although the attorneys involved have to some extent "itemized" the work they have done on this case, they neglect to mention in their itemizations that the motions and briefs on which they spent time researching and preparing dealt only with these disputes with the Court over jurisdiction and attorneys fees. The precise number of hours spent on the motions and briefs is not stated. At least with respect to attorney fee disputes, the Sixth Circuit has made clear that district courts are to limit compensation for fee requests. In *Coulter v. State of Tennessee*, 805 F.2d 146 (6th Cir. 1986), a Title VII civil rights action which was ultimately resolved by a consent judgment, the court held:

> In absence of unusual circumstances, the hours allowed for preparation and litigating the attorney fee case should not exceed 3% of the hours in the main case when the issue is submitted on the papers without a trial and should not exceed 5% of the hours in the main case when a trial is necessary.

Id. at 151.

suits alleging negligent training and supervision are not uncommon phenomena. This District Judge, alone, presently has no less than 24 such cases on his docket. Moreover, the legal questions are governed by well-established Supreme Court precedent.

The attorneys also base their novelty/difficulty argument in this civil action for money damages on the high degree of publicity surrounding the criminal prosecution of the individual police officers. However, the City agreed to settle this civil action for $5.2 million less than 3 weeks after Malice Green died, which was seven months before the criminal trial began.[7]

C. SKILL REQUISITE TO PERFORM LEGAL SERVICE PROPERLY

The three attorneys all state in their Affidavits that it would have been necessary to have a high degree of skill to successfully litigate this case through jury verdict. The Court does not dispute this. However, in light of the fact that the City agreed to a settlement of this case almost immediately after the Complaint was filed and served, no litigation skills were ever utilized.

D. PRECLUSION OF OTHER EMPLOYMENT

All three attorneys have stated that the large amount of time they spent on this case did impact on their practices. However,

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7. Mr. Jarrett also makes a novelty/difficulty argument predicated upon his disputes with the Court's legal rulings concerning attorney fees and Plaintiff's ineffective attempts to divest this Court of jurisdiction. Although the Court believes that Mr. Jarrett made some novel arguments concerning the Court's jurisdiction and attorneys' fees, it is the novelty of the legal issues presented by the Plaintiffs *Complaint* that is the focus of the novelty/difficulty factor.

neither Ms. Brandy nor Mr. Jarrett indicate that they had to turn away other work, and in fact, Mr. Jarrett explicitly stated that he did not decline to accept employment from other clients in matters he would not otherwise have accepted. Mr. Dorsey does state that he had to refer cases to other attorneys or simply reject them out of hand, but he does not indicate how many times he had to do either.

E. THE AMOUNT INVOLVED AND THE RESULTS OBTAINED

The total settlement amount in this case was $5.25 million. While the Court agrees that this was a very favorable settlement for the Plaintiffs, it cannot be denied that it did not require a great amount of work on the part of the attorneys to persuade the City to settle the matter. However, the Court acknowledges that the attorneys did devote substantial time to arriving at an agreement as to the distribution of settlement proceeds among the various claimant/heirs of Malice Green.

F. FEES SOUGHT AND THE FEES CUSTOMARILY CHARGED IN THE LOCALITY FOR SIMILAR SERVICES

All three of the attorneys argue for a distribution of fees based upon contingent fee agreements.[7] As indicated above, Ms. Brandy and Mr. Jarrett seek $1.2 million, i.e., one-third of the full settlement amount. Mr. Dorsey argues that he is entitled to one-half of the $1.2 million, i.e., $600,000, and that Brandy and Jarrett should share the other half.

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7. As set forth above in this Opinion and Order, the Court has already determined the contingent fee agreements to be invalid.

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With respect to fees for similar actions in the community, none of the attorneys have produced any evidence of the customarily charged fee in Detroit for similar services.[8] However, they each have stated what their customary hourly fees are. Mr. Jarrett and Mr. Dorsey both assert that their customary hourly fees are $200.00 per hour. Ms. Brandy states that her customary hourly fee is $100.00.

G. TIME LIMITATIONS IMPOSED BY THE CLIENT OR CIRCUMSTANCES

As indicated above, this case was settled almost immediately after it was filed.

H. THE NATURE AND LENGTH OF THE PROFESSIONAL RELATIONSHIP WITH THE CLIENT

Ms. Brandy was the first attorney involved in this action. She states that she initially was representing all three of Malice Green's heirs — his wife, Rose Mary Green, and his two daughters, Edniquech Grubbs and Jacqueline Dennison. However, shortly thereafter, Jacqueline Dennison, the minor daughter, through her mother, terminated Ms. Brandy's representation and soon afterwards, Edniquech Grubbs terminated her relationship with Ms. Brandy. She subsequently retained Mr. Dorsey.

Mr. Jarrett got involved in the case through Ms. Brandy shortly after the Complaint was filed in this case.

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8. Ms. Brandy does state with respect to the customary fees of other attorneys in the area that "[a]ttorneys practicing in personal injury, wrongful death or police misconduct commonly charge 33 1/3 percent on a contingency basis."

Appendix B

I. EXPERIENCE, REPUTATION AND ABILITY OF THE LAWYERS

All three of these attorneys are experienced lawyers. Ms. Brandy has 13 years of litigation practice experience, including experience in negligence and wrongful death actions. Mr. Dorsey has 15 years of litigation experience in the areas of wrongful death, probate, police misconduct and personal injury. Mr. Jarrett has more than 15 years legal experience. His area of expertise is police misconduct litigation, such cases making up approximately 75% of his practice.

* * * * * * * * *

With respect to *quantum meruit* attorneys' fees, this case presents unique circumstances. On one hand, the attorneys had to do very little real work to motivate the City to offer a $5.25 million settlement of the lawsuit. On the other hand, the Court does not dispute that the lawyers *did* work to facilitate an amicable agreement among the numerous claimant/heirs for the distribution to them of settlement proceeds. The Court further notes that Mr. Jarrett, and to a lesser degree, Mr. Dorsey, did a substantial amount of work preparing motions and briefs and arguing the issues raised in those motions, albeit that the motions did not concern prosecution of the merits of Plaintiffs' lawsuit, but rather were principally concerned with disputing this Court's rulings regarding jurisdiction and attorneys' fees.

The Court further accepts, as stated by the lawyers, that they devoted a substantial amount time to this case. As set forth above, Mr. Jarrett estimates that he spent as much as 1000 hours on this case. However, even crediting 1000 hours of time (which is the highest amount claimed), a good portion of Mr. Jarrett's

time was involved with disputing this Court's jurisdiction and authority to review attorneys' fees. As noted, this cannot be fully credited. For that reason, the Court will credit Mr. Jarrett with 700 hours for purposes of determining the "lodestar" base amount. Mr. Dorsey estimated that he spent 425 hours on this matter. Although Ms. Brandy did not give an "hour" estimate, she did state that she worked on this case from November 1992 through August 1993, and that during that time, she devoted 60% of her practice time to this case. The Court, therefore, calculates that Ms. Brandy spent approximately 865 hours on this matter (9 months x 4 weeks = 36 weeks x 40 hrs/wk = 1440 furs. x .6 = 864 hours). The Court further accepts as reasonable,the customary fees charged by each of these attorneys for similar work on other cases (Mr. Jarrett $200/hr.; Mr. Dorsey $200/hr; Ms. Brandy $100/hr). However, the Court rejects the attorneys' contentions that this case presented novel and difficult legal questions.

As indicated above, all three attorneys seek fees based upon the 1/3 contingent fee agreements. However, the case law makes clear that the Court is not obligated to award fees based upon contingent fee agreements that have been determined to be invalid. Under such circumstances, the Court must determine what would be a "reasonable" fee. The Court finds that the $1.2 million sought jointly by Ms. Brandy and Mr. Jarrett and the $600,000 sought by Mr. Dorsey to be unreasonable fees.

The Court will use as a starting point for determining reasonable fees, the " 'lodestar' hours x hourly rate" formula. Based on the affidavits provided by the attorneys and the Court's findings, for Mr. Jarrett, this "base" amount is $140,000; for Mr. Dorsey, $85,000 and for Ms. Brandy, $86,500. These sums will be enhanced as follows. As indicated above, the Court

acknowledges that the bulk of the "legal" work on this case was done by Mr. Jarrett, and in this sense, he was effectively "lead counsel". The Court, therefore, will enhance his base amount to $250,000 to reflect his contributions.

As for Ms. Brandy, she was the original attorney on this case. She should be given substantial credit for bringing this case in. She also did the initial work in getting the Complaint filed and in coordinating the probate proceedings. She was the attorney who identified and located Malice Green's heirs, and, it was she who initiated discovery on this matter. The Court finds that under the circumstances a fee for Ms. Brandy of $173,000 — double her estimated hourly value — would be reasonable.

Mr. Dorsey did a significant amount of legal research and brief writing on numerous legal issues. He also is to be credited for having succeeded in obtaining a modification of the original settlement agreement providing for a more equitable distribution of proceeds to the various claimants. However, he came into this case after the initial settlement with the City was completed and, therefore, played no role in achieving the size of the settlement. Under the circumstances, the Court finds that a fee of $170,000 for Mr. Dorsey — double his estimated hourly value — would be reasonable.

CONCLUSION

For the reasons stated in this Opinion and Order,

IT IS HEREBY ORDERED that the Estate of Malice Green shall pay to attorneys Ernest Jarrett, Brunetta Brandy and Sanders Dorsey the following amounts:

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Ernest Jarrett	—	$250,000
Brunetta Brandy	—	$173,000
Sanders Dorsey,	—	$170,000

Numerous liens have been filed with the Court against Mr. Dorsey. Accordingly, no disbursement from the escrowed funds is to be paid to Sanders Dorsey until the various liens regarding funds allegedly owed by Mr. Dorsey have been resolved.

IT IS FURTHER ORDERED that remaining funds in the escrowed account shall be distributed on a pro-rata basis in accordance with the claimants shares in the distribution of funds in the Settlement

Agreement as follows:

RoseMary Green	$	148,049.54
Shakeitha Strawder		2,960.95
Lachieta Miller		5,921.95
Joshua Pitts		5,921.95
Edniquech Grubbs		118,439.59
Zitayvia Anderson		7,402.49
Jacqueline Dennison		133,244.56
Patricia Green		66,622.26
Jesse Green, Jr.		29,610.24
Treise Green		14,804.91

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Sherry Green	14,804.91
Monica Green	14,804.91
Ollie Frye	7,402.42
Peggy Wright	7,402.42

IT IS FURTHER ORDERED that the balance of the funds shall be paid to the Estate.[9]

s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge

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9. This balance to be paid to the Estate includes the $197,541.00 agreed upon in the Settlement Agreement but not yet disbursed, plus an additional pro-rata share of $29,606.72, plus all accrued interest.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED NOVEMBER 7, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 92-CV-76881-DT

Hon. Gerald E. Rosen

ROSE MARY GREEN and EDNIQUECH GRUBBS, Co-Personal Representatives of the Estate of MALICE WAYNE GREEN, Deceased,

Plaintiff,

vs.

CITY OF DETROIT,

Defendant.

OPINION AND ORDER RE: DISTRIBUTION OF SETTLEMENT PROCEEDS AND ATTORNEYS' FEES, AND OTHER MOTIONS ADDRESSED AT THE OCTOBER 21, 1994 HEARING

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on NOV 7 1994

PRESENT: Honorable Gerald E. Rosen
United States District Judge

Appendix C

I. INTRODUCTION

On October 21, 1994, in accordance with the requirements of the Michigan Wrongful Death Act, the Court conducted a hearing on the distribution of settlement proceeds in this wrongful death action.[1] In addition to addressing the issue of settlement distribution among the interested parties,[2] the Court also heard the oral arguments of counsel that same date on several motions, to-wit: (1) the Motion of Co-Personal Representative Rose Mary Green to Dismiss this case for Lack of Subject Matter Jurisdiction; (2) the parallel Motion of Co-Personal Representative Edniquech Grubbs requesting the Court to Relinquish Jurisdiction; and (3) the Motion of Co-Personal Representative Edniquech Grubbs to Amend the Caption of this Case. The Court also heard oral argument on the contingency fee arrangements of the various attorneys involved in this action.

The Court addressed each of these matters from the bench on October 21, 1994 but indicated that it would set forth its rulings in detail in a written opinion. This Opinion and Order sets forth those rulings.

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1. Motions requesting the distribution/approval of distribution plan were filed separately by Edniquech Grubbs and Rose Mary Green, the two co-personal representatives of the estate of Malice Green.

2. The distribution of proceeds to the interested party/claimants will be addressed in a separate Order, following the Court's receipt, review and approval of the report of the Guardian ad Litem for minor claimants Joshua Pitts and Zitayvia Anderson.

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II. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MOTION TO RELINQUISH JURISDICTION

The separately-filed "Jurisdiction" Motions submitted on behalf of the two co-personal representatives raise essentially the same issue, i.e., whether this Court has subject matter jurisdiction over this action which was removed to this Court on November 30, 1992 and settled pursuant to a $5.25 Million "Consent Judgment" entered against the City of Detroit on July 18, 1994.

Co-Personal Representative Green claims that this Court does not have, and never did have, subject matter jurisdiction over this case because the only federal claims asserted in Plaintiff's Complaint were asserted against the individual police officer defendants, and those individuals were never served and never appeared in this case.

Ms. Green's subject matter jurisdiction argument is that since the federal claims were only alleged against the individual defendants, only the individual defendants could have properly removed this case on the basis of federal question jurisdiction. Since the individuals were never served with process, she claims that the City's removal was defective.

Plaintiff's defective removal argument that federal claims were only asserted against the individual defendants is predicated solely upon the "caption" given to Count V of Plaintiff's Complaint, "Deprivation of Constitutional Rights by Individual Defendants." This title, however, fails to take into account the allegations contained in the count, specifically, the introductory statement in Count V that *"Plaintiff repeats and*

realleges paragraphs one through forty-five as though fully stated herein." Thus, incorporated by reference in Count V are all of the allegations of Counts I through IV of the Complaint.

Further, the text of Count V, on its face, alleges that the Defendants (plural) violated Malice Green's "rights under the laws of the Constitution of the United States; in particula[r], the First, Fourth, Fifth, Eighth and Fourteenth Amendments thereof and 42 USC 1983, 1985(2)(3), 1986, and 1988." [Complaint para. 47.]

The previous count, Count IV, (incorporated by reference in Count V), is titled "Negligent Training and Supervision." The specific allegations of Count IV are directed against Defendant City of Detroit and are as follows:

> 40. That prior to November 5, 1992, *Defendants* ***CITY OF DETROIT*** *Police Department and Chief of Police Stanley Knox* ***permitted, encouraged, tolerated and ratified a pattern and practice of unjustified, unreasonable, and excessive force by police officers*** in that:
>
> a. *Defendant failed to discipline* or prosecute or in any manner deal with known repeated incidents of excessive force by the same officers;
>
> b. *Defendant refused to investigate* a significant number of previous incidents of improper force by the

same Defendants and, instead, officially claimed that such incidents were justified and proper;

c. By means of both inaction and a cover-up of such excessive force, Defendant Sgt. Freddie Douglas encouraged police officers employed by Defendant CITY to believe that excessive force was permissible.

d. By allowing supervisory officers, as SGT. DOUGLAS, observe illegal conduct and not intervene with force and deliberate action to stop such illegal conduct.

e. By failing to render the necessary medical treatment to a citizen who has suffered the brutal beating of the officers.

41. That the City of Detroit Police Department has allowed the brutal actions of the Detroit police officers to continue without correction, though Defendant had specific knowledge of Officers NEVERS and BUDZYN's dangerous violent propensities and inappropriate excessive force use.

42. *That Defendant has maintained no*

system of review or has failed to identify instances of improper use of force or *to discipline, more closely supervise, or retrain specific officers* who in fact improperly used such force.

43. On information and belief, the systemic deficiencies include but are not limited to:

a. Preparation of investigative reports designed to vindicate the use of excessive force, regardless of whether such actions were justified;

b. Preparation of investigative reports which uncritically rely solely on the word of police officers involved in the incidents and which systematically fail to credit testimony by non-police officer witnesses;

c. Preparation of investigative reports which omit factual information and physical evidence which contradicts the accounts of the officers involved;

d. Issuance of public statements exonerating officers involved in such incidents prior to the completion of investigation;

e. Failure to review investigative reports by responsible superior officers for accuracy or completeness and acceptance of conclusions which are unwarranted by the evidence or which contradict such evidence.

44. ***The foregoing acts, omissions, and systemic deficiencies are policies and customs of Defendant*** and such caused police officers of Defendant to continuously use such excessive force in nonthreatening confrontations with suspects with full knowledge that their conduct would be neither necessary, reasonable nor legal.

45. *As a direct and proximate result of the aforesaid acts, omissions, systemic deficiencies,* ***policies and customs of Defendant, the Defendant's police officers*** *improperly beat and killed the Plaintiff's decedent.*

These Count IV allegations are sufficient to allege a Section 1983 deprivation of civil rights claim against the City under *Monell v. Department of Social Services*, 426 U.S. 658, 98 S.Ct. 2018 (1978) and *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989). *See also*, *Marchese v. Lucas*, 758 F.2d 181 (6th Cir. 1985), *cert. denied*, 480 U.S. 916 (1987) (County sheriff's failure to conduct any investigation into beatings and failure to discipline any of the officers, indicated a County policy to deprive the constitutional rights of prisoners who had threatened the lives of police officers.)

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As indicated, above, Plaintiff incorporated the Count IV policy/failure to discipline allegations in Count V. Count V states, in pertinent part:

> *Plaintiff repeats and realleges paragraphs one through forty-five as though fully stated herein.*
>
> 46. *The actions alleged above deprived Plaintiff's decedent, MALICE W. GREEN, of the following rights under the United States Constitution:*
>
> a. Freedom from the use of excessive and unreasonable force;
>
> b. Freedom from a deprivation of liberty without due process of law;
>
> c. Freedom from summary punishment;
>
> d. Freedom from cruel and unusual punishment.

Clearly, the plain language of the Complaint contradicts the contention that no federal claim was asserted against the Defendant City.

Furthermore, Plaintiff Green's "defective removal" argument ignores well-established Supreme Court and Sixth Circuit precedent.

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In *Grubbs v. General Electric Credit Corporation*, 408 U.S. 699, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972), the Supreme Court addressed a similar "defective removal" argument. That case involved a complaint by General Electric Credit Corporation ("GECC") to recover on a promissory note which was filed in Texas state court. Three years later, the defendant, filed an amended answer and "cross-action" in the state court against GECC and its subsidiary, General Electric Company ("GE"), for damages, and against several additional parties which held outstanding judgments against Grubbs for a determination of priorities among the judgment liens. One of these added parties was the United States.

The United States removed the matter to federal court. All of the parties treated the effect of the removal as placing before the District Court not only the claim against the United States for determination of lien priorities, but also GECC's principal claim on the promissory note and Grubbs's claim against GE for damages. At no time during the pendency of the action in the District Court did GECC or GE by motion to remand or otherwise object to the removal of the case to federal court.

The case was ultimately tried by the Court in a bench trial. The court held against GECC on the promissory note and found in favor of Grubbs on his tort claim for damages. The court awarded Grubbs $20,000 and dismissed Grubbs's claims against the United States and the other judgment lienors.

GECC subsequently appealed the District Court's decision and, on its own motion, the Fifth Circuit questioned federal court jurisdiction. After calling for additional briefing, the appellate court decided that Grubbs's "interpleader" of the United States and the other judgment lienors was a spurious basis for joining

the United States as a party, and therefore, the Court of Appeals held that removal by the Government was improper.

The Supreme Court reversed the appellate court's decision, and held that federal jurisdiction was proper. The Court explained:

> Longstanding decisions of this Court make clear, [that] where after removal a case is tried on the merits without objection and the federal court enters judgment, *the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.*
>
> * * *
>
> Applying this doctrine to the case before use, we note that the parties concede in their briefs that petitioner is a citizen of Texas, and that respondent and GE are citizens of New York. Respondent GECC in its pleadings initiating the action in state trial court sought recovery of $66,000 from petitioner Grubbs; Grubbs in his state court cross-action sought recovery of $25,000 from respondent. There was thus diversity jurisdiction in the Federal District Court under 28 U.S.C. § 1332 if the action had been brought in that court originally.

92 S.Ct. at 1347 (emphasis added).

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In *Morda v. Klein*, 865 F.2d 782 (6th Cir. 1989), the Sixth Circuit adopted the rationale of the *Grubbs* rule in the context of a defective removal under federal question jurisdiction over a RICO action, explaining:

> The *Grubbs* rule is eminently sensible, and conservative of judicial economy; it prevents a party who waits until after he loses in the court below to object to the jurisdictional defect from getting a second bite at the apple. ***Provided that the district court, as here, would have had original jurisdiction had the action been filed in the first instance in the federal court and would have had jurisdiction at the time of final judgment it works no expansion of federal jurisdiction.***

865 F.2d at 784 (emphasis added). *See also*, *Aradia Women's Health Center v. Operation Rescue*, 929 F.2d 530, 534 (9th Cir. 1991) (holding that when defective removal of a § 1985 violation of civil rights case is not timely objected to prior to judgment in proceedings in the district court, the relevant jurisdictional question from the result of these proceedings is not propriety of removal but only whether the federal district court would have had original subject matter jurisdiction had the case been originally filed in the federal court).

The procedural track of the instant case in this Court is substantially similar to the cases cited above.

This case was originally filed in the Wayne County Circuit Court on November 9, 1992. On November 30, 1992, it was

removed to this court on the basis of federal question jurisdiction under the Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. §§ 1983, 1985, 1986 and 1988. It cannot be disputed that federal question jurisdiction under these civil rights statutes and the provisions of the United States Constitution appears *on the face of Plaintiff's Complaint.* [See Complaint, Count V, para. 47-48]. Therefore, this Court would have had original federal question jurisdiction over this action had the case been originally filed in federal court instead of in the state court.

Moreover, at no time after removal did Plaintiff move to remand this action for improper removal within the time limitations for doing so in 28 U.S.C. § 1447(c) ("A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a)"). Nor did Plaintiff, at any time thereafter, move to remand this case. Now, three months after Plaintiff (through counsel) stipulated to, and submitted to the Court for entry, a Consent Judgment of $5.25 million pursuant to which the City of Detroit agreed to pay $5.25 million in damages in exchange for Plaintiff's (and all of the individual claimants') agreements to release all claims against the City ***and all of the individual Defendant police officers*** named in the Complaint, Ms. Green seeks dismissal of this action on improper removal grounds. As discussed above, case law does not support Plaintiff's argument.

Because this Court would have had original federal question jurisdiction had the action been filed in the first instance in the federal court and, thus, had jurisdiction at the time of entry of the Consent Judgment in July of this year, Plaintiff cannot now seek dismissal by arguing that this Court lacks jurisdiction over the case on "improper removal" grounds.

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Both Co-Personal Representatives Green and Grubbs also argue that this Court has no jurisdiction to address the post-judgment distribution of settlement proceeds in this case under the Supreme Court's recent decision in *Kokkonen v. Guardian Life Insurance*, __ U.S. __, 114 S.Ct. 1673 (1994). Plaintiffs misread *Kokkonen*.

In *Kokkonen*, the Supreme Court held that the district court could not, under its inherent powers, exercise ancillary jurisdiction over a breach of a settlement agreement dispute when the case from which the settlement emanated had been dismissed with prejudice, and no provision in the dismissal had been made for the court's retention of jurisdiction over the matter to monitor the parties' compliance with the settlement agreement. The *Kokkonen* Court made clear, however, that a district court could retain jurisdiction over post-judgment matters if it so provided in entering the judgment. The Court stated:

> [T]he parties' compliance with the terms of the settlement contract (or the court's "retention of jurisdiction" over the settlement contract) may, in the court's discretion, be one of the terms set forth in the order. Even when, as occurred here, the dismissal is pursuant to Rule 41(a)(1)(ii) (which does not by its terms empower a District Court to attach conditions to the parties' stipulation of dismissal) we think the court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree.

114 S.Ct. at 1677. *See also, Downey v. VanderLaan*, __ F.3d __, 1994 U.S. App. LEXIS 18622 (6th Cir. 1994) in which the Sixth Circuit adopted the *Kokkonen* reasoning that a district court is authorized to enforce a settlement after entry of judgment if it expressly retained jurisdiction to do so when entering judgment.

As an initial matter, this case differs from *Kokkonen* and *Downey* in that here, *there has been no dismissal* of the case; only a "Consent Judgment" releasing the City of Detroit and the named individual defendants from this matter was entered. The monetary proceeds of that Judgment, $5.25 million, was placed in an interest bearing escrow account with the express understanding that the proceeds would be distributed pursuant to post-judgment motions.

Furthermore, in accordance with *Kokkonen* and *Downey*, this Court explicitly retained jurisdiction over the distribution of settlement proceeds, including attorneys' fees, when it entered the Consent Judgment on July 18, 1994, and Plaintiff Green's counsel, Ernest Jarrett, on the record, expressly stated that *he had no objections*:

> THE COURT: I want it to be clear on the record, as I told counsel before we went on the record, as I told counsel in chambers, that by signing this consent judgment, the court is not waiving jurisdiction over this matter to determine appropriate disbursal of funds, including payment of attorneys fees. The court understands that . . . that will be the subject of, I assume, motion practice and decisions by the court. But I want it clear that this [court] is not waiving jurisdiction over

> those issues by signing this consent judgment.
>
> * * *
>
> . . . I think the prudent way to proceed then is for me to sign this, incorporate into this judgment the colloquy that we've had here on the record, and send a copy to all counsel of this transcript.

[Transcript of July 18, 1994 Settlement Proceedings, pp. 8, 11-12.]

Mr. Jarrett expressly concurred in the Court' retention of jurisdiction over the post-judgment distribution of the settlement proceeds:

> MR. JARRETT: It's my understanding, and it's always been my practice under this statute, that whether it be by consent judgment or some other order which approves the settlement, a separate order which would disburse moneys and approve attorneys fees would come and we intend to bring a motion which, if fully granted, would resolve all of those issues.
>
> Now, as I indicated off the record, if you grant part of the [motion] and withhold a ruling on the other part, then of course we'll make partial disbursements, but our motion will not be in bifurcated form.

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* * *

> THE COURT: All right. I have a copy of the original [proposed Consent Judgment] and I will sign that. Hopefully that will move this matter on to the next stage.
>
> You'll be presenting further motions in the near future, Mr. Jarrett?
>
> MR. JARRETT: Yes, your honor, after the exchange of the releases and the checks.

[July 18, 1994 Transcript, pp. 9, 16.]

For all of the foregoing reasons, and for the further reasons stated by the Court on the record on October 21, 1994, the Court finds that it has federal question subject matter jurisdiction over this action and has properly retained jurisdiction over the post-judgment disbursement of proceeds proceedings.

Accordingly, Co-Personal Representative Rose Mary Green's Motion to Dismiss for Lack of Subject Matter Jurisdiction and Co-Personal Representative Edniquech Grubbs's Motion to Relinquish Jurisdiction will be DENIED.

B. MOTION TO AMEND CAPTION

Co-personal representative Edniquech Grubbs asks that the Court amend the caption of this case to reflect the names of *both* co-personal representatives of Malice Green's Estate, i.e., Rose Mary Green and Edniquech Grubbs. Both Rose Mary Green and Edniquech Grubbs were duly appointed co-personal

representatives by Order of the Wayne County Probate Court prior to the filing of the Complaint in this action. The amendment of the caption sought by Ms. Grubbs would make her a party-plaintiff in this action. Therefore, the Court will treat Ms. Grubbs's Motion as a Fed. R. Civ. Pro. 24 Motion to Intervene.

Rule 24 provides, in pertinent part:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or transaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: . . . when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Ms. Grubbs has asserted that she is not in agreement with her co-personal representative and the attorneys retained by her

regarding some of the issues pertaining to the disbursement of proceeds from the estate of her deceased father, Malice Green, and that she has perceived that Ms. Green has not adequately represented the interests of *all* of the persons claiming an interest in Malice Green's estate.

Having considered Ms. Grubbs's assertions, the Court finds that Edniquech Grubbs, as a duly-appointed co-personal representative of the estate of Malice Green, at present, is so situated that the disposition of this action may as a practical matter impair or impede her ability to fulfill her obligations to the estate with respect to this wrongful death action. The Court further finds that, because under Michigan law, the powers and duties of co-personal representatives can only be exercised in their joint capacity,[3] Ms. Green, acting alone, cannot adequately represent the estate in this matter.

For all of these reasons, and for the reasons stated by the Court on the record on October 21, 1994, the Court will GRANT Edniquech Grubbs's Motion to Amend the Caption of this case. Henceforth, the caption of this matter shall read "Rose Mary Green and Edniquech Grubbs, Co-Personal Representatives of the Estate of Malice Wayne Green, Deceased, vs. City of Detroit", and all further documents filed shall bear the new caption.

C. ATTORNEYS' FEES

Contingent fee agreements are allowed in Michigan wrongful death actions. Michigan Court Rule 8.121 provides as follows:

---

3. *See, Action Auto, Inc. v. Anderson*, 165 Mich. App. 620, 419 N.W.2d 36, 38 (1988), *lv. denied*, 430 Mich. 873 (1980); *Nichols v. Pospiech*, 289 Mich. 324, 286 N.W. 633 (1939); and the discussion in Section C(2), *infra*.

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(A) Allowable Contingent Fee Agreements. In any claim or action for personal injury or wrongful death based upon the alleged conduct of another, in which an attorney enters into an agreement, expressed or implied, whereby the attorney's compensation is dependent or contingent in whole or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than the fee stated in subrule (B) is deemed to be fair and reasonable. The receipt, retention, or sharing of compensation which is in excess of such a fee shall be the charging of a "clearly excessive fee" in violation of Canon 2, DR 2-106(A) of the Code of Professional Responsibility and Canons.[4]

---

4. The Code of Professional Responsibility was replaced in by the Michigan Rules of Professional Conduct in October 1988. DR 2-106 has been replaced by Rule 1.5 of the RPC, which retained the "clearly excessive fee" terminology of DR 2-106. Rule 1.5 provides as follows:

> (a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

(Cont'd)

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(B) Maximum Fee. The maximum allowable fee for the claims and actions referred to in subrule (A) is one-third of the amount recovered.

(Cont'd)

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputations, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

* * *

(Cont'd)

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(C) Computation. The amount referred to in subrule (B) shall be computed on the net sum recovered after deducting from the amount recovered all disbursements properly chargeable to the enforcement of the claim or prosecution of the action. . . .

(D) Agreements for Lower Fees. An attorney may enter into contingent fee arrangements calling for less compensation than that allowed by subrule (B).

(E) Advice to Client. An attorney must advise a client, before entering into a contingent fee arrangement, that attorneys may be employed under other fee arrangements in which the attorney is

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(Cont'd)

(c) A fee may be contingent on the outcome of the matter for which the service is rendered. . . . A contingent-fee agreement shall be in writing and shall state the method by which the fee is to be determined. . . .

* * *

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised of and does not object to the participation of all lawyers involved; and

(2) the total fee is reasonable.

> compensated for the reasonable value of the services performed, such as an hourly or per diem basis. The method of compensation used by an individual attorney remains the attorney's option, and this rule does not require an attorney to accept compensation in a manner other than that chosen by the attorney.
>
> **(F) Agreements to Be in Writing.** Contingent fee arrangements made by an attorney with a client must be in writing and a copy provided to the client. . . .

MCR 8.121 (emphasis added).

All of the attorneys involved in this case, except Ernest Jarrett, Steven Malach, Ralph Sirlin, and Thomas Ricca, are relying on contingent fee agreements with their respective clients for payment of their fees. Mr. Jarrett admits that he did not have contingent fee agreement with anybody. Rather, he claims that he and Brunetta Brandy agreed to share her contingent fees. Mr. Malach, co-counsel for co-personal representative Edniquech Grubbs, has submitted a detailed billing statement for fees based on his hourly rate.

Mr. Ricca is local counsel for Michael Cohen, attorney for claimant Peggy Wright. Mr. Sirlin is local counsel for Joseph Phebus, attorney for First Busey Trust, the guardian of the estate of minor claimant Jacqueline Dennison. Both Mr. Ricca and Mr. Sirlin are being paid by their respective lead counsel. Mr. Ricca is to be paid 20% of any fees received by lead counsel Michael Cohen. Mr. Sirlin's fees are being paid by Joseph Phebus and are based on his hourly rate.

Appendix C

1. THE CONTINGENT FEE AGREEMENTS OF THE ATTORNEYS FOR THE INDIVIDUAL INTERESTED CLAIMANTS

The attorneys for the individual interested claimants — i.e., Rose Mary Green, Joshua Pitts, Shakietha Strawder, Lachieta Miller, Edniquech Grubbs, Zitayvia Anderson, Patricia Green, Jesse Green, Treise Green, Monica Green, Sherry Green, Jacqueline Dennison and Peggy Wright — have all produced copies of their respective contingent fee agreements.

Kenneth Hylton, who represents Rose Mary Green (in her personal, individual capacity) and Ms. Green's children, Joshua Pitts, Shakietha Strawder and Lachieta Miller, has an agreement calling for Ms. Green's payment to him of 10% of the amount awarded to her. (Mr. Hylton agreed to charge nothing for his representation of Joshua Pitts, and, although he had contingent fee agreements with Ms. Strawder and Ms. Miller, he waived his right to fees from these two claimants, as well.)

Jerome Barney represents Edniquech Grubbs (in her personal, individual capacity) and Ms. Grubbs's daughter, Zitayvia Anderson. He has a contingent fee agreement calling for fees in the amount of 10% of the amounts awarded to Ms. Grubbs and her daughter.

Justin Ravitz, who represents Malice Green's parents, Patricia Green and Jesse Green; his sisters, Treise Green, Monica Green and Sherry Green; and his grandmother, Ollie Frye, has a contingent fee agreement with his clients pursuant to which he is to be paid fees amounting to one-third of the amount recovered by each client in excess of the settlement proposals offered to the clients prior to their retention of Ravitz.[5]

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5. Pursuant to this agreement, Mr. Ravitz's fees would total $164,584.98. Mr. Ravitz, however, has agreed to reduce his fees to $156,000.

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Joseph Phebus has a contingent fee agreement pursuant to which he is to be paid fees in an amount equal to 33 1/3% of Jacqueline Dennison's net recovery.

Michael Cohen has a contingent fee agreement under which is his to be paid fees in an amount equal to one-third of any amount recovered by his client, Peggy Wright.

The Court has reviewed the foregoing fee agreements and finds them to be valid, and the proposed awards reasonable.

2. ATTORNEYS FOR THE ESTATE'S CO-PERSONAL REPRESENTATIVES

Attorneys Brunetta Brandy and Ernest Jarrett purport to represent the "Estate of Malice Green" by virtue of their representation of Co-Personal Representative, Rose Mary Green (although, as noted, Ernest Jarrett, personally, does not have a written agreement with the co-personal representative). Attorney Saunders Dorsey also purports to represent the Estate through his representation of the other co-personal representative of the estate, Edniquach Grubbs.

Ms. Brandy and Mr. Jarrett argue that they are entitled to payment of $1,200,000 from the Estate pursuant to Ms. Brandy's contingency fee arrangement with Rose Mary Green and Edniquech Grubbs. Mr. Jarrett claims that he is entitled to share in Ms. Brandy's fees by virtue of a fee sharing agreement with Ms. Brandy.

Mr. Dorsey also relies upon a contingency fee agreement with Edniquech Grubbs, pursuant to which he is to receive one-half of the Estate's attorneys fees (i.e., $600,000).

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The contingency fee agreements relied upon by Ms. Brandy and Mr. Jarrett were produced at the October 21, 1994 hearing. There are two separate letter agreements, one addressed to Ms. Green, the other addressed to Ms. Grubbs. The agreements provide as follows:

November 8, 1992

Re: Estate of Malice Wayne Green

Dear Ms. Green:

This letter is intended to set forth the agreement between this firm and you regarding fees for services rendered in connection with my representation of you in prosecuting the above claim. This case will be handled on a contingent fee basis. This means that this firm, as your attorney, will receive a fee for services only if and when you receive a monetary recovery by way of either successful prosecution or settlement of your claim.

The following amount sets forth the contingent fee for services which will be charged by this firm in connection with the handling of this claim:

33 1/3 percent of any amount received.

The fee percentage set forth above shall

be computed on the net sum recovered by you, after deducting from the amount recovered all disbursements property [sic] chargeable to the enforcement of the claim or prosecution of the action. These disbursements and out of pocket expenses will consist of items such as court filing fees, deposition and discovery expenses, investigating costs, expert witness fees, and other incidental expenses.

It is also understood that you will be responsible for payment of all disbursements and out of pocket expenses, regardless of whether or not there is any recovery in connection with your claim.

Finally, in computing the contingent fee under circumstances where your recovery consists of payment of a judgment in your favor, recovery shall be deemed to include all costs taxed by the court and all interest included in, or on, the amount of the judgment.

Attorneys may be employed under fee arrangements, other than contingent fees, whereby they are compensated for the reasonable value of their services, such as on an hourly, fixed or per diem basis. I understand that, notwithstanding these alternatives, you desire to engage this firm on the basis of the contingent fee arrangement set forth in this letter.

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If the foregoing is satisfactory to you, kindly acknowledge your agreement by signing and returning the enclosed copy of this letter to the undersigned.

Very truly yours,
/s/
Brunetta Brandy

Acknowledged and agreed:
/s/
Rose Mary Green

An identical letter agreement was sent to, and executed by, Ms. Grubbs.

In neither of these letter agreements is there any indication that Ms. Brandy was representing the Estate of Malice Green, or that there was any understanding that she was to be paid fees by the "Estate". The letters set forth the agreement "regarding fees for services rendered in connection with *my [Brunetta Brandy's] representation of you* in prosecuting the above claim" and that "as your attorney, [I, Brunetta Brandy] will receive a fee for service only if and when ***you*** receive a monetary recovery." The letters close, "If the foregoing is satisfactory to ***you***, kindly acknowledge *your agreement* by signing and returning the enclosed copy of this letter."

Neither letter is signed by either Ms. Green or Ms. Grubbs in her *representative* capacity. (Below Ms. Green's signature line is typed only her name, "Rose Mary Green." There is nothing printed or written below Ms. Grubbs's signature.)

Furthermore, each letter is addressed only to one individual — one says "Dear Ms. Green", the other says, "Dear Ms. Grubbs". Nowhere in either letter is there any indication of Ms. Green's and Ms. Grubbs's *co*-representation of the Estate or that they jointly retained Ms. Brandy to represent the Estate of Malice Green.[6]

Moreover, the agreements were never ratified or approved by the Probate Court and no such ratification or approval order was ever filed.[7]

Michigan law is clear, when two or more qualified persons are named as co-personal representatives of an estate, the signature of only one of the co-personal representatives cannot bind the estate, as a matter of law. *Action Auto, Inc. v. Anderson*, 165 Mich. App. 620, 419 N.W.2d 36, 38 (1988), *lv. denied*, 4430 Mich. 873 (1988).

Action Auto squarely involved the issue of whether, when there are co-personal representatives of an estate, one co-personal representative acting alone could contractually bind the estate. That case involved a dispute over the sale of some real estate. The last will and testament of Kenneth J. Anderson, Sr. named the decedents three sons, Kenneth Anderson, Jr., Michael Anderson and Ronald Anderson as "co-personal representatives". The decedent had owned some real estate which

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6. Indeed, the only mention in the letter of the "Estate of Malice Green" is the prefatory reference notation.

7. It is particularly important that any agreements to retain and compensate counsel be approved by the probate court when co-personal representatives of an estate are appointed because of the potential for disagreement.

passed to his estate upon his death. Kenneth, Jr. executed an agreement on behalf of the estate to sell the property to Action Auto, a Michigan corporation. Although the agreement had signature lines for all three co-personal representatives, only Kenneth Jr., signed it.

Action Auto subsequently sued for specific performance, requesting the court to declare the sale valid and binding. The co-personal representatives moved for summary disposition alleging that the agreement executed by only Kenneth, Jr. was void because it was not signed by all of the named co-personal representatives. The trial court granted the summary disposition motions. Action Auto appealed and the Michigan Court of Appeals affirmed the trial court's decision. The appellate court explained:

> The issue of whether all qualified personal representatives named in a will must act jointly in conveying real estate appears to be one of first impression in this state. However a number of other jurisdictions have addressed the issue. These jurisdictions [Mississippi, Delaware, Pennsylvania, and Illinois] have all required joint action in the absence of a specific provision in the will. [Citations omitted.] See also 34 C.J.S., Executors and Administrators, § 1043, pp. 1319-1323; 31 Am.Jur.2d, Executors and Administrators, § 457, p. 211, and cases cited therein. The Uniform Probate Code also requires joint action.
>
> If two or more persons are appointed

> co-representatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate." 8 Uniform Laws Annotated, Uniform Probate Code, § 3-717, p. 340 (1983).

We are persuaded by these authorities that Michigan should also adopt the requirement of joint action when the will is silent as to the authority of co-personal representatives to act individually.

In adopting the majority rule, we recognize that our Supreme Court in *Vernor v. Coville*, 54 Mich. 281, 290-291, 20 N.W. 75 (1884), stated:

> Co-executors and co-administrators are regarded, in law, as but one person, and acts done by one are deemed to be the pacts of all in all matters relating to a personal estate
>
> . . . .

However, we believe that plaintiff's reliance on this statement is misplaced. The issue in *Coville* was whether one co-executor had the authority to bind the estate when the second co-executor [named in the will] was not qualified [under the law] to act on behalf

> of the estate. Accordingly, the Court's statement following its ruling that the act of the qualified co-executor was valid is dictum.

419 N.W.2d at 38-39 (emphasis added).

In *Nichols v. Pospiech*, 289 Mich. 324, 286 N.W. 633 (1939), the Union Guardian Trust Company and Elliott Nichols were named in the will of the late Elliott Slocum co-executors and co-trustees of Slocum's estate. The will authorized the co-trustees to invest the trust estate funds in real estate. Thomas Boyle, the officer of Union Guardian Trust Company responsible for Slocum's estate, entered into a contract for the purchase of a piece of property and paid a $1,000 deposit from trust funds. The contract provided that in case of nonperformance by the purchaser, the deposit could be retained by the seller as damages. Boyle signed the purchase contract, "Union Guardian Trust Company, Co-Trustee under the will of Elliott T. Slocum, Deceased, by Thomas R. Boyle, Trust Officer."

After he executed the contract and paid the deposit, Boyle notified co-trustee, Elliott Nichols, of the transaction. Nichols objected to the purchase. He demanded that the contract be rescinded and that the seller refund the deposit and return it to the trust fund.

Relying on her right to retain the deposit as set forth in the contract, the seller refused to refund the money paid to her. The co-trustees then instituted a lawsuit to recover the deposit.

Noting that there were no Michigan cases on point, the Michigan Supreme Court looked to the Restatements and cases in other jurisdictions, and concluded that the contract entered

into by Mr. Boyle was void because it was not executed by both co-trustees. The court explained:

> A discussion of but one question is deemed necessary, that is, where one of two trustees exceeds his authority by entering into a contract for the purchase of real estate and uses trust funds in making an initial payment without the consent of his cotrustee, the latter disapproving the transaction as soon as he is informed thereof, may the trustees maintain an action in assumpsit against the vendor to recover the deposit?
>
> In Restatement of Law of Trusts, p. 516 § 194, it is said:
>
> > "If there are two or more trustees, the powers conferred upon them can properly be exercised only by all the trustees, unless it is otherwise provided by the terms of the trust."
>
> Thus rule has also been stated as follows:
>
> > "When the administration of a trust is vested in cotrustees, they all form but one collective trustee. They must, therefore, execute the duties of the office in their joint capacity. This principle enters into all cases depending on the discretion and

> judgment of the trustees in contradistinction to acts of a mere ministerial nature." 26 R.C.L. p. 1333. . . .

It was said by the court [in *Dingman v. Boyle*, 285 Ill. 144 (12 N.E. 487)]:

> "Where there are several trustees, they all form, as it were, one collective trustee, therefore they must perform their duties in their joint capacity, even in making a purchase."

It is clear, therefore, that Mr. Boyle, the trust officer of the Union Guardian Trust Company, who signed the contract and paid the deposit from the funds of the trust estate, was exceeding his authority when he entered into the contract without consulting Mr. Nichols, the cotrustee. For this reason, the agreement to purchase was invalid.

The appellant was placed on notice as to possible limitations on the authority of those with whom she dealt when the contract was signed by the purchaser in a manner indicating the existence of a cotrustee who was not a party thereto. A trustee acts in a representative capacity and persons dealing with him are bound to be cognizant of the extent of his powers. [Citation omitted]. . . .

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> The trial court was not in error in his findings and conclusions that plaintiffs were entitled to recover of defendant the sum of $1,000 plus interest thereon from August 28, 1935. . . .

289 Mich. at 333-334

In this case, the Probate Court appointed Rose Mary Green *and* Edniquech Grubbs as co-personal representatives of the Estate of Malice Green. That appointment order does not authorize one co-personal representative to act alone and bind the estate.

Because Ms. Green and Ms. Grubbs did not *jointly* execute any agreement retaining Ms. Brandy on a 1/3 contingent fee basis *to represent the Estate* of Malice Green, or for payment of fees from Estate funds, Ms. Brandy has no binding written fee agreement with the Estate for $1,200,000.

Moreover, Ms. Grubbs asserts that she became dissatisfied with Ms. Brandy's and (Mr. Jarrett's) representation of the Estate shortly after this lawsuit was filed, and she, therefore, *discharged* them. She states that she grew disenchanted with Ms. Brandy's (and Mr. Jarrett's) representation because it appeared to her that they were "taking sides" in the matter, siding with one co-personal representative, Rose Mary Green, and giving the personal interests of Ms. Green and her three children more advantageous treatment than the interests of Ms. Grubbs and her daughter and the other "blood relatives" of Malice Green. Therefore, she discharged Ms. Brandy and retained other counsel.

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In her capacity as co-personal representative of the Estate of Malice Green, she retained Saunders Dorsey under a fee arrangement pursuant to which he would purportedly receive one-half of the $1,200,000 designated for the fees of the attorneys of the estate.

Mr. Jarrett argues that Ms. Grubbs acted without the agreement of co-personal representative Rose Mary Green when she discharged Ms. Brandy (and Mr. Jarrett). Therefore, he contends that, notwithstanding any breakdown in the attorney-client relationship, Ms. Grubbs' unilateral actions discharging Ms. Brandy were wrongful. Therefore, Jarrett argues that the Estate must be deemed to continue to be bound by the contingency fee contracts executed by Ms. Green and Ms. Grubbs calling for the payment of $1,200,000, and he should, accordingly, be deemed entitled to a share of that sum pursuant to his fee sharing arrangement with Ms. Brandy.

Although Mr. Jarrett disputes Edniquech Grubbs's authority to act unilaterally to discharge Brandy and Jarrett and hire a new attorney, as Mr. Dorsey noted at the October 21, 1994 hearing, once Ms. Grubbs did object to Ms. Brandy's (and Mr. Jarrett's) representation, her co-personal representative, Rose Mary Green was equally left without authority to unilaterally continue to bind the estate to the purported $1.2 million contingent fee agreement.

In sum, the Court finds that there is *no* valid agreement with the Estate and *any* lawyer for two reasons: (1) there is no valid signed agreement with the estate, and (2) even if there were at the beginning a valid agreement, once Edniquech Grubbs discharged Ms. Brandy and hired Mr. Dorsey, the co-personal representatives clearly were no longer acting jointly as required by law.

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This same analysis defeats Mr. Jarrett's claim for a share of the "contingent fee" through his fee-sharing arrangement with Ms. Brandy. As indicated above, Mr. Jarrett admits that he personally did not have any retainer/contingent fee agreement with any of the parties. Rather, he claims that he is entitled to share in Ms. Brandy's $1,200,000 contingent fees because he and Ms. Brandy had a "fee sharing" agreement. Just as the Court finds Ms. Brandy's contingent fee agreements to be invalid, the Court also finds that Mr. Jarrett's fee sharing agreement with Ms. Brandy is void.

As noted *supra* in this Opinion and Order, Michigan's contingent fee rule, MCR 8.121, incorporates by reference DR 2-106(A) which is now MRPC Rule 1.5. Subsection (e) of Rule 1.5 provides that

> A division of a fee between lawyers who are not in the same firm may be made *only if*:
>
> (1) *the client is advised of and does not object to the participation of all lawyers involved*; and
>
> (2) the total fee is reasonable.

In this case, Brunetta Brandy purports to have been engaged to represent "the Estate of Malice Green". As discussed *supra*, because co-personal representatives for the Estate were appointed, only their joint agreement to the participation of Ernest Jarrett could validate a fee sharing arrangement. Ms. Grubbs states that she did not consent to Jarrett's participation, and in fact, expressly objected to it. Therefore, Mr. Jarrett would have no right to claim entitlement to any part of a "contingent fee" payment, even if a valid contingent fee agreement existed.

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Because Ms. Brandy and Mr. Jarrett were discharged by Ms. Grubbs and their contingent fee and fee sharing agreements determined to be invalid, Mr. Dorsey suggests that all that Brandy and Jarrett should be entitled to is the *quantum meruit* reasonable value of their services. Dorsey further concedes that he, also, should be awarded fees on a *quantum meruit* basis.

The Court agrees with Mr. Dorsey.

The issue of whether an attorney who has been discharged by his client is nonetheless entitled to hold the client liable for payment of fees pursuant to a contingency fee contract entered into prior to the discharge was addressed in *Ambrose v. Detroit Edison Co.*, 65 Mich. App. 484, 237 N.W.2d 520 (1976).

The trial court in *Ambrose* determined that the discharged attorney was entitled to the contingent fee percentage agreed upon with his client prior to the termination of his services. Therefore, the court imposed a lien on the settlement obtained for that amount. The Court of Appeals, although agreeing that it was proper to impose a lien on the settlement behalf of the wrongfully discharged attorney, determined that the trial court erred in deciding that the full contingent fee amount was to be the amount covered by the lien.

The appellate court explained:

> Although we hold that a lien could be properly imposed, we cannot agree with the trial judge's method of calculating the amount covered by that lien. Although no Michigan case has decided this issue, the majority view is that an attorney on a

contingent fee arrangement who is wrongfully discharged, or who rightfully withdraws, is entitled to compensation for the reasonable value of his services based upon *quantum meruit*, and not the contingent fee contract. [Citations omitted.] The rationale for that rule was explored in *Fracase v. Brent*, *supra*, 6 Cal.3d [784], 789-790, 100 Cal. Rptr. [385], 388-389, 494 P.2d [9], 12-13 [(1972)]:

> "The right to discharge is of little value if the client must risk paying the full contract price for services not rendered upon a determination by a court that the discharge was without legal cause. The client may frequently be forced to choose between continuing the employment of an attorney in whom he has lost faith, or risking the payment of double contingent fees equal to the greater portion of any amount eventually recovered. . . . Unless a rule is adopted allowing an attorney as full compensation the reasonable value of services rendered to the time of discharge, clients will often feel required to continue in their service attorneys in whose integrity, judgment or capacity they have lost confidence."

We agree with that reasoning and adopt the rule here. 237

N.W.2d at 524. *See also, Dean v. Holiday Inns, Inc.*, 860 F.2d 670, 672 (6th Cir. 1988); *Law Offices of Lawrence Stockler, P.C. v. Semaan*, 135 Mich. App. 545, 355 N.W.2d 271 (1984).

For the foregoing reasons, the Court finds that attorneys Brandy, Jarrett and Dorsey will be entitled to fees from the Estate of Malice Green in an amount reflecting the *quantum meruit*, i.e., reasonable value of the services rendered.

In deciding the reasonable value of an attorney's services, Michigan courts use the factors set forth in Rule 1.5(A) of the Michigan Rules of Professional Conduct, which provides in pertinent part:

> The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputations, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

MRPC 1.5(A). *See also*, *Crawley v. Schick*, 48 Mich. App. 728, 211 N.W.2d 217 (1973).

The Court will apply the foregoing factors in determining the amount of the fees to be paid to attorneys Brandy, Jarrett, and Dorsey. At the October 21, 1994 hearing, the Court permitted these attorneys to supplement the information they had provided as to the value of their services.[8] Thus, the amount of fees for these attorneys will be determined in a separate Opinion and Order after the Court has received the supplemental information concerning their fee affidavits.

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8. This information was ordered to be provided to the Court as early as December 28, 1992, and that order was repeated on June 30, 1993 and on several occasions thereafter. The information ultimately provided by the attorneys as of the October 21 hearing, however, was cursory (although Mr. Jarrett did provide sufficient detail.) Nonetheless, in the interests of fairness, the Court decided to permit supplementation of the record.

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CONCLUSION

For all of the reasons set forth in the foregoing Opinion,

IT IS HEREBY ORDERED that Plaintiff Rose Mary Green's Motion to Dismiss Case for Lack of Subject Matter Jurisdiction and Edniquech Grubbs's Motion to Relinquish Jurisdiction are hereby DENIED.

IT IS FURTHER ORDERED that Edniquech Grubbs's Motion to Amend Caption is hereby GRANTED.

The DISTRIBUTION of settlement proceeds, and the determination and distribution of attorneys' fees to be charged against the Estate of Malice Green, will be addressed in separate Orders.

s/ Gerald E. Rosen
Gerald E. Rosen
U.S. District Court Judge

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED APRIL 13, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 92-CV-76881-DT
Hon. Gerald E. Rosen

ROSE MARY GREEN, Personal Representative of the Estate of MALICE WAYNE GREEN, Deceased,

Plaintiff,

vs.

LARRY NEVERS, WALTER BUDZYN, PAUL GOTELAERE, JAMES KIJEK, KARL GUNTHER, ROBERT LESSNAU, SGT. FREDDIE DOUGLAS, ROBERT KANE, JONATHAN DOTY, STANLEY KNOX, Individually and in their capacity as City of Detroit Police Officers, and the CITY OF DETROIT, Jointly and Severally,

Defendants.

OPINION AND ORDER FINDING THAT THE COURT HAS JURISDICTION

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on APR 13 1993

Appendix D

PRESENT: Honorable Gerald A. Rosen
United States District Judge

I. INTRODUCTION

This is a § 1983/wrongful death action arising out of an alleged beating incident which occurred on November 5, 1992. The action was filed in Wayne County Circuit Court and timely removed to this Court by Defendant City of Detroit. This matter is now before the Court on the Court's Order to Show Cause as to whether the Court has retained jurisdiction over this matter.

II. PERTINENT FACTUAL AND PROCEDURAL HISTORY

Plaintiff Rose Mary Green, wife of he late Malice Wayne Green and co-personal representative of his estate, filed this Section 1983 wrongful death action on November 9, 1992 in Wayne County Circuit Court.[1] In their wrongful death complaint[2] for negligence, assault and battery and deprivation of constitutional rights in violation of 42 U.S.C. §§ 1983, 1985

1. Although not reflected in the cation of the Complaint in this action, Mrs. Green is not the sole personal representative of her late husband's estate. Rather, Mrs. Green and Edniquech Grubbs, the putative daughter of Mr. Green, were appointed "*co*-personal representatives" of Malice Green's estate by Wayne County Probate Judge Milton Mack on November 9, 1992, the same date on which the Complaint in this action was filed.

2. Plaintiffs instituted this action pursuant to the Michigan Wrongful Death Act, M.C.L. § 600.2922. A Wrongful Death Act action is the only mechanism for survivors of a person wrongfully killed to recover damages for the decedent's death. *See Courtney* v. *Apple*, 345 Mich. 223, 76 N.W.2d 80, 83 (1956); *Crystal* v. *Hubbard*, 92 Mich. App. 240, 285 N.W.2d 66, 68 (1979), *rev'd on other grounds*, 414 Mich. 297 (1982).

and 1986, Plaintiffs allege that certain Detroit police officers (the named individual Defendants) beat Mr. Green to death on November 5, 1992.

Defendant City of Detroit (the only Defendant served with process) timely removed the action to this Court on November 30, 1992 based upon this Court's original federal question jurisdiction by virtue of Plaintiff's claims under 42 U.S.C. §§ 1983, 1985(2)(3), 1986, and 1988.

Two weeks later, on December 14, 1992, Attorney Brunetta Brandy, pursuant to Fed. R. Civ. P. 41(a)(1), filed a "Notice of Voluntary Dismissal Without Prejudice." Ms. Brandy signed this pleading as attorney for Malice Green's widow, Rose Mary Green, the personal representative of the estate of Malice Green.

On December 22, 1992, the Court was advised that Plaintiffs, Defendant City of Detroit, and the other parties with an alleged interest in Malice Green's estate[3] had reached an agreement, and the parties wished to place a proposed settlement on the record.[4] The proposed settlement provided for the payment by Defendant City of Detroit to Plaintiffs and the other alleged interested parties the aggregate sum of approximately $5.25 million. This aggregate sum included the payment of almost $1.7 million to Plaintiffs' attorneys. [See Appendix A.]

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3. These other interested parties include Malice Green's children, stepchildren, granddaughter, parents, sisters, half-sister, and grandmother.

4. Under to M.C.L. § 600.2922(5), the Court must approve or reject a settlement proposed by parties to a wrongful death action. The Detroit City Council must also approve the settlement before it can be implemented by the Defendant City of Detroit.

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Prior to the settlement hearing, counsel for the parties requested the Court to seal all proceedings and pleadings relating to this case and the proposed settlement, allegedly so that the rights of the Defendant police officers in the pending criminal prosecution would be protected from any prejudice arising from the settlement. The Court denied this request, and told counsel that this was a matter of great public interest, and large sums of public monies were being paid to private parties and attorneys. The Court also pointed out that the officers had already been the subject of harsh criticism by leading City officials and had been summarily terminated by the City, and there had already been a televised and highly publicized preliminary examination in the criminal case.[5]

During the December 22nd settlement hearing, Attorneys Brunetta Brandy and Ernest Jarrett entered appearances as co-counsel on behalf of Rose Mary Green, co-personal representative of the estate of Malice Green. Attorney Gerald Thurswell appeared on behalf of the deceased's eldest daughter, Edniquech (a/k/a "Eneatra") Grubbs, both on behalf of Ms. Grubbs, personally, and in her capacity as co-personal representative of the estate of Malice Green. Mr. Thurswell also represented the deceased's only other child, Jacqueline Dennison, the deceased's parents, Patricia Green and Jessie Green, Jr., and the deceased's sisters, Treise, Monica and Sherry Green.

After the parties had completed this task, the Court and counsel discussed the issue of Ms. Brandy's voluntary dismissal notice:

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5. The Court understands that counsel made the same request to Judge Michael L. Stacey when the matter was pending in the Wayne County Circuit Court and that Judge Stacey similarly denied their request.

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The Court: I need a stipulation of counsel and, Ms. Brandy, I think you signed the notice of voluntary dismissal. I need a stipulation from *both* counsel to reinstate the case, *nunc pro tunc*, back to the date of the notice of dismissal.

Mr. Jarrett: Your Honor, we would prepare that stipulation subject to the things that we're going to go over the next couple of weeks, and prepare it, and file it with the Court next week or next moth, if your Honor please.

The Court: I wanted you to do it forthwith. *The case is either here or it's not here.*

Mr. Jarrett: I understand that, your Honor. We don't have any problems with that.

The Court: *Do we have a stipulation to reinstate it?*

Mr. Jarrett: *Yes.*

The Court: We've got a record here. I've got to have something to file this record on.

Ms. Braceful: *Yes.* So stipulate, your Honor.

The Court: All right. The case will be

> reinstated to the docket of this Court effective December 14, 1992, and the Court will vacate the notice of voluntary dismissal that was filed, without prejudice, by Ms. Brunetta Brandy . . .

Because the proposed settlement included the payment of almost $1.7 million to Plaintiffs' attorneys, at the conclusion of the December 22nd hearing, the Court requested Plaintiffs' counsel to file affidavits by January 5, 1993 reflecting pertinent information relating to the work Plaintiffs' attorneys had done on the case in order to assist the Court in determining whether the proposed attorneys' fee payment was appropriate.

The following week, on December 28, 1992, the Court entered a formal order reflecting the December 22, 1992 record stipulation of counsel reinstating the case. This Order acknowledged the on-the-record stipulated revocation of the dismissal notice and reinstated the case to the Court's docket *nunc pro tunc*. In that December 28th Order, the Court also detailed the information it required from Plaintiffs' attorneys relating to their fee request, including the number of hours spent on the case, their customary billing rates, whether other work was precluded by the necessity of work on this case, and other information required by prevailing law to support an award of attorney fees. The Court ordered that this information be filed no later than January 5, 1993.

Also on December 28, 1992, the Court received a letter from Illinois attorney Joseph W. Phebus, in which Mr. Phebus advised the Court that he had been retained by Jacqueline Dennison's mother, Kim Nihiser, to provide legal representation for her daughter regarding the death of Jacqueline's father, Malice

Green. In his letter, Mr. Phebus asked the Court to hold the proposed settlement under advisement until he was able to conduct an investigation to determine whether it was in the best interest of Jacqueline Dennison. Mr. Phebus stated, "If we need to file a formal appearance and obtain local counsel at this time, please advise and we will proceed to do so."

The next day, December 29, 1992, the Court received a letter from Mr. Thurswell explaining that his services on behalf of the deceased's parents, sisters, and youngest daughter had been terminated. In addition, Mr. Thurswell stated that he planned to make a motion to withdraw as counsel for his sole remaining client, co-personal representative Edniquech Grubbs, when he returned from vacation on January 4, 1993.[6] In his letter, Mr. Thurswell requested that the Court "not make a decision until [Mr. Ravitz and Mr. Phebus] have an opportunity to file an appearance herein and have had an opportunity to be heard." In addition, Mr. Thurswell stated,

> [S]ince I am going to be filing a motion on Monday, January 4, 1993 to withdraw on behalf of Edniquech Grubbs, the Co-Personal Representative of the Estate of Malice Green and the daughter of Malice Green, I ask that

6. In fact, Mr. Thurswell and his law firm, Thurswell, Chayet & Weiner, by Mr. Thurswell's associate, Melissa Gross, filed a Motion to Withdraw on the same day of Mr. Thurswell's letter to the Court, December 29th. (The reason given for Ms. Gross's preparation and submission of the Motion on Mr. Thurswell's behalf was that Mr. Thurswell was "out of the country until January 4, 1993 and haste is needed to protect the interest of the parties herein.") In that Motion, Mr. Thurswell and the Thurswell firm requested leave to withdraw as counsel for *all* of their then clients, Edniquech Grubbs, Patricia Green, Jessie Green, Monica Green, Sherry Green, Tracy Green and Jacqueline Dennison.

> you likewise hold in abeyance any decision until she has had an opportunity to retain counsel and has an opportunity to be heard.

As promised, Mr. Thurswell's law firm did file a motion to withdraw. [See note 3, *supra.*] The reason for the motion to withdraw was that the parties represented by Mr. Thurswell and the Thurswell firm "have conflicting interests in the distribution of and apportionment of the settlement offer herein" and, therefore, Mr. Thurswell and his firm "have a conflict of interest, having obtained knowledge and information from the various referred to clients." [See Thurswell Motion to Withdraw, para. 8-9.]

On January 4, 1993, Attorney Justin C. Ravitz filed with the court an appearance on behalf of the deceased's parents, Jessie Green, Jr. and Patricia Green, and the deceased's sisters, Treise, Sherry and Monica Green.[7] (A few days later, on January 6, 1993, Mr. Ravitz also filed a notice of appearance on behalf of the deceased's grandmother, Ollie Frye.)

On January 5, 1993, Mr. Thurswell filed an affidavit in support of his motion to withdraw as attorney for Edniquech Grubbs.

Also on January 5th, while this Court was sitting by designation in the Western District of Tennessee, Ms. Brandy and Mr. Thurswell had apparently signed a "Stipulation and Order for Substitution of Attorney" and attempted to have the presiding judge enter an "Order for Substitution of Attorney" in this Court's absence. That proposed order stated that Ms.

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7. Also on that date, the Court received a letter from Mr. Ravitz, in which he informed the Court that he had been retained by these clients.

Brandy was to be substituted in the place of Mr. Thurswell as representing Edniquech Grubbs in her capacity as co-personal representative of the estate, but that proposed order was never entered and the stipulation was never filed.

The affidavits and supporting information relating to attorneys' fees ordered by the Court to be filed no later than January 5th, however, were not filed by any of the Plaintiffs' counsel, and no extension of time was ever requested, nor was one granted.

Rather, on January 7, 1993 at 5:02 p.m., Ms. Brandy filed a "Notice of Appearance of Co-Counsel," in which she entered an appearance as co-counsel (presumably along with Mr. Thurswell since the Court had not yet ruled on his pending motion to withdraw) for Endniquech Grubbs, co-personal representative of the estate of Malice Green. Then, at 5:03 p.m., Ms. Brandy and Mr. John P. Quinn, an attorney for the City of Detroit, filed a "Stipulation to Dismiss Action Without Prejudice and Without Costs", pursuant to Fed. R. Civ. P. 41(a)(1). Ms. Brandy signed the stipulation in her capacity as "Attorney for Plaintiff [singular]." [8]

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8. Because Mrs. Green and Ms. Grubbs have conflicting interests in Malice Green's estate (particularly with respect to the proposed settlement), it appears to the Court that Ms. Brandy's attempt to represent Mrs. Green and Ms. Grubbs, individually and in their representative capacities as co-personal representatives of Malice Green's estate, could well present a conflict of interest for Ms. Brandy. See *Michigan Rules of Professional Conduct*, Rules 1.7 and 1.8. The Court believes that this apparent conflict exists with Ms. Brandy's dual representation fo a number of reasons, but particularly because there is nothing of record to date to establish that Ms. Grubbs can be legally recognized as Malice Green's child so as to be entitled to share in the proceeds of a settlement of this suit, although counsel have indicated to the Court that such evidence would be provided.

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On January 11, 1993 — the day this Court returned from its Tennessee designation assignment — the Court met with all counsel[9] and was informed that the settlement proposed to the Court at the December 22, 1992 hearing had broken down (the proposed beneficiaries of the settlement were no longer in agreement over the allocation among them of the proceeds), but that all parties wished to pursue further settlement negotiations. The Court encouraged this.

At that January 11 meeting, the Court inquired about the "Stipulation to Dismiss" and was informed that neither Mr. Ravitz nor Mr. Phebus joined in it, and, in fact, objected to it. Although Mr. Jarrett expressed the view that he wanted the case to go to the State Probate Court, no further action was taken by any party.

A week later, on January 14, 1993, Mr. Phebus, filed his formal appearance on behalf of Kim Nihiser as mother and next friend of Jacqueline Dennison. Mr. Phebus also filed an "Objection to the Petition to Dismiss The Case", stating his

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9. January 11th was originally noticed as the date for a hearing on Mr. Thurswell's Motion to Withdraw. The Court discussed Mr. Thurswell's Motion with counsel during the conference and indicated that it would grant the motion once all of Mr. Thurswell's clients obtained appropriate substitute counsel. Mr. Mr. Ravitz and Mr. Phebus had notified the Court via correspondence that they were going to be representing some of Mr. Thurswell's former clients, and in fact, these two attorneys attended the January 11 conference. (Mr. Ravitz also had filed his formal "Appearance".) However, as of January 11th, the Court had no notice of substitute counsel for Edniquech Grubbs, either individually or in her capacity as co-representative of the estate, and the Court does not believe any of the attorneys informed it of Ms. Brandy's eleventh-hour January 7th filing of an appearance as "co-counsel" for Ms. Grubbs while this Court was sitting in Memphis, Tennessee.

concern that Jacqueline Dennison's rights might be compromised if the Court did not retain jurisdiction.

The next day, January 15th, Attorney Saunders V. Dorsey filed an appearance on "behalf of the Co-Personal Representative, Edniquech Grubbs."

On February 1, 1993, Defendant City of Detroit filed a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss the case with prejudice arguing that, as a matter of law, governmental immunity protects the city from liability and Plaintiff has failed to state a Section 1983 claim upon which relief can be granted. The city also filed a proof of mailing of its first set of interrogatories and response to Plaintiff's first request for production of documents.

Also on February 1, Attorney Jerome P. Barney filed an appearance on behalf of Edniquech Grubbs, in her co-personal representative capacity.[10]

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10. Further Appearances of counsel were filed on March 31 and April 2, 1993. Attorney Cyril Hall filed an Appearance as "co-counsel on behalf of co-counsel for co-representative Edniquech Grubbs." Attorney Kenneth Hylton, Jr. filed a "Limited Appearance" as "Attorney for Rose Mary Green, Individually." Attorney Thomas Ricca has filed a "Limited Appearance" on behalf of Peggy Wright [the decedent's half-sister], stating that he is representing Ms. Wright in her capacity as "Personal Representative of the Estate of Malice Green."

The Court also notes that Briefs have been filed in this case by Jerome Barney, as "co-counsel for Edniquech Grubbs in an individual capacity," however, Mr. Barney's February 1, 1993 "Appearance" only indicates that he is representing Ms. Grubbs in her representative capacity as co-personal representative. The Court further notes that proofs of service filed in this case indicate that pleadings have been served upon Michael Cohen of San Francisco, California, although there is nothing in the record of this case to indicate what Mr. Cohen's role in this action might be.

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On February 10, 1993, Ms. Brandy and Ms. Braceful filed a stipulation for enlargement of time for Plaintiff to respond to Defendant City of Detroit's motion to dismiss.

On March 4, 1993, the Court entered an Order granting Mr. Thurswell's motion to withdraw as counsel for Edniquech Grubbs in her individual capacity and as co-personal representative of the estate of Malice Green. The Order also permitted Mr. Thurswell to withdraw as counsel for the deceased's parents, Jessie Green, Jr. and Patricia Green, his sisters, Treise, Sherry and Monica Green, and his youngest daughter, Jacqueline Dennison.

Throughout the course of three months, the Court consistently encouraged the parties to continue to attempt to reach agreement and met with counsel — both personally and by telephone — on numerous occasions during this period toward that end. At each of these sessions, counsel and the Court discussed the parameters of what type of settlement might be acceptable to the Court. The Court consistently told counsel it would entertain any reasonable allocation of settlement proceeds, subject to the conditions that the proposed settlement:

> 1. Be submitted to the Court by formal motion with a hearing conducted in open court;
>
> 2. Any proposed settlement payments to beneficiaries be supported by an evidentiary record sufficient to support their alleged interest; and
>
> 3. That any attorneys' fees proposed to be

paid under the settlement be supported by the information requested in the Court's December 28, 1992 Order which reflects the law on the prevailing standards for an award of attorneys' fees.

At a number of these sessions, the Court informed counsel that, with respect to attorneys' fees, it would not approve any settlement which did not give the Court the discretion to (1) make independent findings, based upon affidavit or in-court evidence, of an appropriate award of attorneys' fees; and (2) refund to the City of Detroit any amount in excess of that supportable by such evidence.

At a meeting between the Court and all counsel on February 1, 1993, counsel proposed that the Court, as a first step, approve a settlement in the aggregate amount of $5.25 million, and that if the parties were not able to agree upon an allocation between themselves, the Court would conduct an evidentiary hearing to determine the allocation of the $5.25 million in settlement proceeds, including attorney fees. However, under this proposal, even if the parties were to agree to an allocation amongst themselves, no settlement proceeds could be returned to the Defendant City of Detroit, even if the Court were to find that the beneficiaries and the attorneys could be adequately compensated for an amount less than $5.25 million.

The Court reiterated its position that it would not approve a settlement which did not give the Court discretion to return to the City any amount in excess of that which the Court found to be supportable for attorneys' fees by competent evidence.

Because settlement negotiations appeared to have reached

an impasse, on March 4, 1993, the Court sent out a Notice, setting a March 25, 1993 Scheduling Conference with all counsel to set dates for pre-trial discovery, motion cut-off, final pre-trial conference, and trial.

Several days prior to the Scheduling Conference, the Court was contacted by two private attorneys who, the Court was told, had been retained by the parties to help negotiate and facilitate a settlement amongst them. These attorneys requested to meet with the Court to report progress on settlement. The Court agreed to meet in chambers with the two attorneys prior to the March 25 Scheduling Conference.

The Court met with the two attorneys as they requested before the Scheduling Conference. At that meeting, the Court was informed that the parties had reached a settlement, which included different allocations amongst the claimants than the previous settlement, and the payment of $1.2 million to certain attorneys with other attorneys to be compensated directly out of their clients' allocations. In response to the Court's inquiry, the Court was informed that if it found the $1.2 million allocation in attorneys' fees to be excessive, it could re-allocate it to the claimants, but not back to the Defendant City.

The Court told the two attorneys that it would not approve such a proposal because, first, it invited "back-door" payments to the lawyers from their clients from both the increased allocations in the settlement itself, and from any funds the Court might re-allocate to the claimants. Secondly, the proposal was not acceptable because it did not permit the Court to return excess monies to the City.

After the Court indicated its disapproval of this new

settlement proposal, the Court was informed that the parties were now taking the position that this Court no longer had jurisdiction over the matter because the case had been dismissed by virtue of either the December 14, 1992 "Notice of Voluntary Dismissal" or the January 7, 1993 "Stipulation to Dismiss", and the parties were going to proceed in the Wayne County Probate Court.

At the March 25, 1993 Scheduling Conference, counsel informed the Court that they believed the case had been dismissed by virtue of the "Stipulation to Dismiss Action" filed on January 7, 1993. In view of the unsettled state of the parties and pleadings at that time and the intervening activities of counsel and the parties in this court, including the filing of substantive pleadings, the Court expressed its skepticism on this point, invited all of the interested parties to file briefs on the dismissal/lack of jurisdiction issue, and set a show cause hearing for April 13, 1993. The court then entered a formal Order to show cause in which the Court granted leave for the filing of briefs on the issue of whether the case should be dismissed for lack of jurisdiction.

Various parties have filed briefs addressing this question, and the Court has carefully reviewed and considered counsel's arguments. This Opinion and Order will address first, the jurisdiction issues and second, the conduct of counsel in this case.

III. ANALYSIS

A. THIS ACTION WAS NOT EFFECTIVELY DISMISSED BY THE JANUARY 7, 1993 "STIPULATION TO DISMISS ACTION WITHOUT PREJUDICE"

The precise legal issue before the Court is whether the

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January 7, 1993 "Stipulation to Dismiss Action Without Prejudice and Without Costs," signed only by Ms. Brandy and Mr. Quinn, on behalf of "[t]he plaintiff [singular] and the defendant City of Detroit", effectively dismissed this case." [11]

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11. Counsel wisely do not argue that Plaintiff's earlier December 14, 1992 "Notice of Voluntary Dismissal Without Prejudice," signed only by Ms. Brunetta Brandy and only on behalf of one of the co-personal representatives, "Plaintiff Rosemary Green, Personal Representative of the Estate of Malice Wayne Green" effectuated the dismissal of this action. That Notice of Voluntary Dismissal was not effective to begin with because it is signed only by My. Brandy who at the time represented only Ms. Green. Gerald Thurswell, who was representing the other co-personal representative of Malice Green's estate, Edniquech Grubbs, *did not sign* the Notice of Dismissal.

Moreover, even assuming *arguendo* that Ms. Brandy's signature on behalf of only one of the co-personal representatives was sufficient to effectuate the Notice of Volunatary Dismissal, Ms. Brandy, *on the record* at the December 22, 1992 hearing on this matter requested that the Court *vacate* her Notice of Voluntary Dismissal and reinstate the case, and the Court granted her request both on the record on December 22, and in a formal Order on December 28, 1992.

Although Attorney Jarrett did not make a formal argument in his Brief relying on the December 14, 1992 Notice of Voluntary Dismissal, Mr. Jarrett did opine at the March 25th Conference that the Court's vacating of the Notice and reinstatement of the case was not effective because Mr. Thurswell did not stipulate to reinstatement at the December 22nd hearing; only Mr. Jarrett and Ms. Brandy had so stipulated.

To the extent that counsel now assert invalidity of the Court's reinstatement order due to the failure of Mr. Thurswell to stipulate to reinstatement on the record at the December 22, 1993 hearing, the Court rejects this argument for several reasons. First, none of the parties ever moved for reconsideration of the December 28, 1992 Order, and the time limit for

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1. The January 7, 1993 Stipulation Was Not Signed By All Parties Who Have Appeared In This Action

The starting point for addressing this issue is Fed. R. Civ. P. 41(a), which provides in pertinent part:

> **(a) Voluntary Dismissal: Effect Thereof.**
>
> **(1) By Plaintiff; by Stipulation.** Subject to the provision of Rule 23(e) [dismissal in a class action], of Rule 66 [an action where a receiver has been appointed], and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, *or (ii by*

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doing so (10 days from the date of the Order) has long expired. Second, the Notice of Voluntary Dismissal was only made on behalf of Rose Mary Green, who was/is represented by Attorneys Brandy and Jarrett. Mr. Thurswell's clients did not join in that voluntary dismissal; therefore, his stipulation to vacate the dismissal was not required. Lastly, as indicated above, any argument that Mr. Thurswell, in addition to Attorneys Brandy and Jarrett, had to have stipulated to reinstatement to effectuate reinstatement actually operates against Plaintiffs' position because, to argue that Thurswell had to consent to reinstatement means that Thurswell, as counsel for co-personal representative Edniquech Grubbs, was also required to have joined in the Voluntary Dismissal in order for the dismissal to have had any legal effect in the first place! Thurswell's not having signed the Notice of Voluntary Dismissal on behalf of the other co-personal representative renders that dismissal null and void *ab initio*.

> *filing a stipulation of dismissal signed by all the parties who have appeared in the action.* Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
>
> (2) **By Order of Court.** *Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . .*

Fed. R. Civ. P. 41(a) (emphasis added).

Thus, pursuant to Rule 41(a), an action may be dismissed in three ways: (1) by a plaintiff filing a notice of dismissal before the filing of an answer or motion for summary judgment; (2) by having *all the parties who have appeared in the action* sign a stipulation of dismissal; or (3) by order of the court.

Counsel in this case argue that the January 7, 1993 Stipulation to Dismiss signed only by Ms. Brandy and Mr. Quinn effectively dismissed the case. They argue that the only "parties in interest" that have appeared in this suit are the co-personal representatives of Green's estate, Rose Mary Green and Edniquech Grubbs, and Defendant City of Detroit. Thus, they contend that Ms. Brandy's signature alone on behalf "the

plaintiff [singular]" and Mr. Quinn's signature on behalf of the only served Defendant, the City of Detroit, was all that was needed to satisfy the provisions of Rule 41(a)(1)(ii). They further contend that the individuals on whose behalf recovery of damages from the City is sought under the Michigan Wrongful Death Act and on whose behalf appearances of counsel had been filed are not "parties who have appeared in this action" such that they or their attorneys were also required to have signed the stipulation to effectuate dismissal under Rule 41(a)(1)(ii).

Counsel are correct in their assertions that Rule 41(a)(1) is "self-executing" and, therefore, in most instances, once the Rule is properly complied with, no case in controversy exists any longer and, hence, the court would lack jurisdiction to proceed any further with the action. *See, e.g., Hinsdale* v. *Farmers National Bank & Trust Co.*, 823 F.2d 993, 995 n.1 (6th Cir. 1987); *Smith* v. *Phillips*, 881 F.2d 902, 904 (10th Cir. 1989); *In re Wolf*, 842 F.2d 464 (D.C. Cir. 1988); *Gardiner* v. *A.H. Robins Co.*, 747 F.2d 1180, 1189-90 (8th Cir. 1984). *See also, D.C. Electronics, Inc.* v. *Nartron Corp.*, 511 F.2d 294 (6th Cir. 1975); 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* para. 41.02[2], .02[5] (2d ed. 1984).

However, the key to such "self-execution" is proper compliance with the provisions of the Rule. Under the plain language of subsection (a)(1)(ii) of Rule 41, in order to effect dismissal by stipulation, the stipulation must be signed by "*all the parties who have appeared in the action.*"

As indicated above, counsel contend that only co-personal representatives Rose Mary Green and Edniquech Grubbs and the City of Detroit are "***parties*** who have appeared in this action", and therefore, only their attorneys had to sign the stipulation to

effectuate a Rule 41(a)(1)(ii) dismissal. They argue that the other attorneys who, as of January 7, 1993, had appeared in this case, *i.e.*, Messrs. Thurswell, Ravitz, and Phebus are not counsel for "parties in interest". Counsel refer to the clients of these attorneys as being only "potential claimants" or "putative intervenors".

As of January 7, 1993, the date of Ms. Brandy's and Mr. Quinn's filing of their Stipulation to Dismiss, Mr. Thurswell was still co-counsel of record for Edniquech Grubbs in both her individual and co-personal representative capacity, and still one counsel of record for Jessie and Patricia Green (decedent's parents), Treise, Monica and Sherry Green (decedent's sisters), and Jacqueline Dennison (decedent's youngest daughter).[12]

With respect to Attorney Ravitz, on January 5 and 6, 1993 — i.e., before the filing of the Stipulation — Mr. Ravitz had

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12. Although Ms. Brandy filed a "Notice of Appearance of Co-Counsel" for Edniquech Grubbs in her capacity as co-representative of the Malice Green's estate *one minute* before filing the Stipulation to dismiss, Mr. Thurswell was still *the only attorney of record* representing Ms. Grubbs in her individual capacity and the only counsel of record representing Jacqueline Dennison. Further Mr. Thurswell was still, at the time of the filing of the Stipulation one of the counsel of record representing Malice Green's parents and three sisters. While Mr. Thurswell had filed a Motion to Withdraw as counsel for Edniquech Grubbs, Jessie and Patricia Green, and Treise, Sherry and Monica Green prior to the filing of the Brandy/Quinn Stipulation, *the Court did not grant Mr. Thurswell leave to withdraw as counsel until March 4*, when the Court entered its Order granting Mr. Thurswell's motion. The filing of Mr. Thurswell's Motion to Withdraw prior to the date of filing of the Brandy/Quinn Stipulation did *not* relieve Mr. Thurswell of his duties as counsel of record in this matter. Local Rule 112.1(a) is explicit: "Withdrawal of appearances may be accomplished *only by leave of Court* on motion of counsel".

filed Appearances on behalf of Malice Green's parents, his three sisters and Ollie Frye, Mr. Green's grandmother.[13]

Because counsel take the position that the clients of Attorneys Thurswell, Ravitz and Phebus are not "parties in interest", they argue, without citation of legal authority,[14] that it was not necessary for Messrs. Thurswell, Ravitz and Phebus to have signed the January 7, 1993 Stipulation to effectuate a dismissal under Rule 41(a)(1)(ii) as of that date.

The Court finds no merit in counsel's argument.

What counsel effectively want the Court to do is to limit a determination regarding "parties who have appeared" to only the parties named in the caption of the Complaint who have been served with process and who have appeared (through counsel) in proceedings in this action. This position is without legal support. Quite the contrary, courts that have addressed the Rule 41(a)(1)(ii) dismissal issue have routinely looked to "parties in interest" beyond those named in the case caption.

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13. With respect to Attorney Phebus, nearly two weeks prior to January 7, 1993, Mr. Phebus had advised the Court ***and all counsel of record*** through correspondence that he had been retained to represent Jacqueline Dennison and was awaiting the Court's instruction as to whether our local court rules or this Court's required that he file a formal document indicating his Appearance in this matter. However, as of January 7th, Mr. Phebus had not filed his formal Appearance.

14. The City of Detroit's Show Cause Brief is the only brief containing any citation of legal authority for the not-parties-in-interest argument. The City cited only one case, *Mutual Produce Inc.* v. *Penn Central Transportation Co.*, 119 F.R.D. 619 (D. Mass. 1989), which, for the reasons discussed *infra*, this Court finds inapplicable.

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United States v. *Mansion House Center North*, 95 F.R.D. 515 (E.D. Mo. 1982), is a good example.

Mansion House involved five consolidated cases (Nos. 76-20, 79-616, 79-618, 79-617 and 80-1563) for foreclosure. The parties in one of the consolidated cases appeared before the court for approval of a proposed settlement agreement. After the court rejected the proposed settlement, one of the plaintiffs, Mercantile Trust Company filed a motion to compel settlement. When that motion came before the court for hearing, counsel advised the court that they were going to file a stipulation for dismissal of three of the consolidated cases pursuant to Rule 41(a)(1). The court determined that the case could not be dismissed by way of the proposed stipulation of the named parties in one of the consolidated suits only, explaining:

> It is the conclusion of this court that Rule 41(a)(1) does not allow the United States and Mansion House Redevelopment Co. to voluntarily dismiss Case Nos. 79-616C(2), 79-617C(2), and 79-618C(2) without the approval of this court. Although the parties have not yet filed their stipulation of dismissal, they have advised this court that it is their intention to do so. . . .
>
> On September 13, 1982, this court entered an order in Cause No. 76-20C(2) in which it formally consolidated Cause Nos. 79-616C(2), 79-617C(2), 78-618(2), and 80-1563(2). * * *
>
> Although this court did not enter its order consolidating these actions until September

13, 1982, *the parties tacitly have been treating these actions as one. To hold otherwise would be elevating form over substance.* The clerk's office has consistently been filing duplicates of documents in the different files and *the various parties have submitted objections to settlement agreements proposed in the Mansion House litigation in which they were not named parties.* Perhaps the objections to the various settlement agreements demonstrate the interrelated nature of these actions and the importance of treating these cases as one. * * * It is evident from the various objections to the different proposed agreements that settlement of one action would have an effect upon the interest of the other litigants in the Mansion House litigation. * * *

In conclusion, this court believes that though a formal order consolidating these cases was not entered until September 13, 1982, *the actions of the parties . . . and equity require the matters to be treated as one.* ***Therefore, Rule 41(a)(1) does not provide for a voluntary dismissal because "all parties who have appeared in the action" have not agreed or consented to the proposed settlement.***

95 F.R.D. at 517-518 (footnotes omitted and emphasis added.)[15]

15. The court also stated that dismissal could not be effectuated by

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Moreover, those cases involving multiple-party settlement agreements in which courts have determined that stipulations pursuant to Rule 41(a)(1)(ii) terminated the cases in controversy, thereby divesting the courts of jurisdiction, have so held because ***all of the parties to the settlement agreements*** had stipulated to the dismissal. *See, e.g., Smith* v. *Phillips*, 881 F.2d 902 (10th Cir. 1989) (pursuant to Rule 41(a)(1)(ii) § 1983 wrongful death action filed by personal representative of decedent's estate was dismissed by stipulation signed by all settling parties, and therefore, the court had no authority to enter orders after the stipulation was filed). *See also, New Mexico ex rel. Energy and Minerals Dept.* v. *U.S. Department of Interior*, 820 F.2d 441 (D.C. Cir. 1987) (even court's approval of settlement between some of the parties under Fed. R. Civ. Pro. 41(a)(2) cannot dispose of valid claims of nonconsenting intervenors. However, since intervenor-defendant's rights were not affected by the settlement, court's dismissal of New Mexico's complaint was allowed to stand. *Id.* at 445.)

Defendant City of Detroit argues that decedents' parents, siblings, children, grandmother and granddaughter should be treated by this Court in the same manner as the petitioners in *Mutual Produce Inc.* v. *Penn Central Transportation Co.*, 119 F.R.D. 619, 1988 U.S. Dist. LEXIS 1549 (D. Mass. 1988). That action involved 600 freight claim disputes involving produce shipped by defendant Penn Central to plaintiff Mutual Produce. Originally, there were 3,000 complaints filed regarding produce freight claims. These complaints were administratively closed for lack of action over a 12-month period. Six years later, the

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stipulation because a receiver had been appointed in one of the consolidated cases and Fed. R. Civ. Pro. 66 does not allow for dismissal by stipulation in actions wherein a receiver has been appointed; the only means for dismissal in receiver cases is by order of the court. 95 F.R.D. at 517.

original plaintiffs and defendants in 600 of the 3,000 original actions filed stipulations to voluntarily dismiss the actions pursuant to Rule 41(a)(1)(ii).

Upon learning of the plaintiff's intention to dismiss these actions, the owners and freight agents of some of the produce underlying the 600 complaints moved to intervene. They did not, however, move for a restraining order seeking a stay of the stipulations of dismissal.

The stipulations of dismissal were filed before the court took any action on the produce owners' motion to intervene. At a hearing held to determine the rights of the produce owners, the produce owners argued that at the time the stipulations of dismissal were filed they were "parties within a fair reading of the rule", and that a stipulation of dismissal would not be proper unless they, too, signed it. 1988 U.S. Dist. LEXIS at **2-3. The defendants argued that the produce owners could not be considered "parties" until their motions to intervene had been granted. As the motions to intervene had not as of the date of the hearing been granted, and no stay order sought, the defendants maintained that the stipulations of dismissal were effective without the consent of the proposed intervenors. *Id.* at **3-4. The court agreed:

> Here, the plaintiffs and defendants together have sought to dismiss their cases under Fed. R. Civ. Pro. 41(a)(1)(ii), which permits all parties to an action to agree to a dismissal without further order by the court. Intervenors were not named parties when plaintiffs and defendants filed their stipulations of dismissal, nor did their filing

> of a motion to intervene give them party status. Indeed motions to intervene are not granted automatically, nor does their filing constitute an automatic stay.

Id. at *4.

As is evident from the foregoing, the district judge's determination that the proposed intervenors were not "parties" under Rule 41(a)(1)(ii) because they had only filed a motion to intervene and "motions to intervene are not granted automatically."

The position of Malice Green's survivors in this case is readily distinguishable from that of the produce owners in *Mutual Produce* because the Michigan Wrongful Death Act effectively makes the participation virtually *automatic* of "all persons who may be entitled to damages", i.e., the decedent's spouse, children, his spouse's children, descendants, parents, grandparents, and siblings." *See* M.C.L. § 600.2922(3) (identifying persons entitled to damages). *See also*, § 600.2922(2), (4) requirement of providing notice to persons entitled to damages); § 600.2922(7), (8) (presentation of claims of persons entitled to damages). No motion to intervene is required under the Michigan Wrongful Death Act for the participation of persons who may be entitled to damages. Indeed, as discussed above, a Wrongful Death Act action is the *only* mechanism for survivors of a person wrongfully killed to recover damages for the decedents death. *See Courtney* v. *Apple*, *supra* 76 N.W.2d 80, 83; *Crystal* v. *Hubbard*, *supra*, 285 N.W.2d 66, 68. While it is true that only duly appointed personal representatives of the estate of the deceased have the legal capacity to institute a wrongful death action — (M.C.L. § 600.2922(2) provides that wrongful death actions must be

brought "by, and in the name of, the personal representative of the estate of the deceased") — it appears that counsel are confusing the legal *capacity* to file a wrongful death complaint, with the *interest* of the decedent's survivors in recovering damages for the decedent's wrongful death.

Simply stated, to accept counsel's argument that Malice Green's children, parents, sisters, half-sister, grandmother, and granddaughter should not be deemed "parties" for purposes of this suit flies in the face of the obvious policy underlying the Michigan statute — that persons in the very position of Malice Green's heirs be provided a mechanism for participation in a suit for recovery of damages for his death.

For all of the foregoing reasons, the Court finds that the January 7, 1993 Stipulation of Dismissal signed only by Ms. Brandy, on behalf of Rose Mary Green, and Mr. Quinn, on behalf of the City of Detroit was not in compliance with the requisites of Fed. R. Civ. Pro. 41(a)(1)(ii), because it was not signed by all "parties who have appeared in the action." Therefore, that stipulation was of no force or effect whatsoever.[16]

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16. The Court is particularly distressed that Messrs. Ravitz and Phebus, now in April 1993, take the position for the first time that the case was dismissed (without their signature on the stipulation) on January 7th when these attorneys have taken precisely the opposite position throughout the course of this litigation.

On December 29, 1992, the Court received a letter from Mr. Thurswell asking the Court to "not make a decision [regarding disposition of this case] until [Mr. Ravitz and Mr. Phebus] have an opportunity to file an appearance herein and have had an opportunity to be heard." Thus, Mr. Thurswell specifically asked the Court to maintain the status quo until Mr. Ravitz and Mr. Phebus had a chance to appear and be heard.

(Cont'd)

2. Even if the Court Were to Determine that the January 7, 1993 Stipulation Complied with Rule 41(a)(1)(ii), by Their Conduct in this Court Since that Date, Counsel and their Clients Have Waived the Right to Now Argue that the Stipulation Should Be Given Effect.

However, the Court will not rest its ruling regarding retention of jurisdiction solely on its analysis regarding compliance with the provisions of Fed. R. Civ. Pro. 41(a)(1)(ii). Even if the Court were to determine that the January 7, 1993 Stipulation could be given effect with only the signatures of Ms. Brandy and Mr. Quinn, since the date of that stipulation, all counsel have filed pleadings on behalf of their respective clients and have appeared before the Court numerous times. In

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(Cont'd)

Mr. Ravitz and Mr. Phebus never assented to the stipulated dismissal. On December 28, 1992, one week *before* the filing of the stipulated dismissal, the Court received a letter from Mr. Phebus stating that he represented Jacqueline Dennison and requesting that the Court not act on a settlement until he had an opportunity to investigate the case. In his letter, Mr. Phebus stated "If we need to file a formal appearance and obtain local counsel at this time, please advise and we will proceed to do so." Although Mr. Phebus had not filed a *formal* appearance until after the stipulated dismissal, he had effectively notified the Court, and by copies of that letter all other counsel, as well, that he represented the deceased's youngest child — Jacqueline Dennison. The Court finds that, in addition to the individuals represented by Messrs. Thurswell and Mr. Ravitz, Jacqueline Dennison is also party who had appeared in the action and, therefore, any stipulated dismissal without her counsel's assent was ineffective.

Moreover, at the January 11, 1993 conference conducted by this Court with all counsel, Messrs. Phebus and Ravitz expressly stated that *they objected to dismissal*. Indeed, on January 14th, Mr. Phebus filed a pleading formally setting forth his client's "Objection to the Petition to Dismiss the Case."

the Court's view, this conduct constitutes a waiver of any attempted dismissal.

On January 11, 1993 — four days *after* the filing of the Stipulation of Dismissal — the Court met with all counsel and was informed that the settlement proposed to the Court at the December 22, 1992 hearing had broken down (the proposed beneficiaries of the settlement were no longer in agreement over the allocation among them of the proceeds), but that *all parties wished to pursue further settlement negotiations.* The Court encouraged this.

At that January 11 meeting, the Court inquired about the "Stipulation to Dismiss" and was informed that neither Mr. Ravitz nor Mr. Phebus joined in it, and, in fact, objected to it.

A week later, on January 14, 1993, Mr. Phebus, filed an Appearance on behalf of Kim Nihiser as mother and next friend of Jacqueline Dennison. Mr. Phebus also filed an "Objection to the Petition to Dismiss The Case", stating his concern that Jacqueline Dennison's rights might be compromised if the Court did not retain jurisdiction.

The next day, January 15th, Attorney Saunders V. Dorsey filed an appearance on "behalf of the Co-Personal Representative, Edniquech Grubbs."

On February 1, 1993, Defendant City of Detroit — a signatory to the purported Stipulation to Dismiss — filed a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss the case, based not upon the alleged stipulated January 7 dismissal but rather, upon the substantive legal argument that governmental immunity protects the City from liability and, thus, Plaintiffs failed to state a Section

1983 claim upon which relief can be granted. The city also filed a proof of mailing of its First Set of Interrogatories and its Response to Plaintiffs' First Request for Production of Documents.

Also on February 1, Attorney Jerome P. Barney filed an appearance on behalf of Edniquech Grubbs, in her co-personal representative capacity.

On February 10, 1993, Ms. Brandy and Ms. Braceful filed a Stipulation for Enlargement of Time for Plaintiffs to respond to Defendant City of Detroit's Rule 12(b)(6) governmental immunity Motion to Dismiss.

On March 4, 1993, the Court entered an Order granting Mr. Thurswell's Motion to Withdraw as counsel for Edniquech Grubbs in both her individual and co-personal representative capacity. The Order also permitted Mr. Thurswell to withdraw as counsel for Malice Green's parents, Jessie Green, Jr. and Patricia Green, his sisters, Treise, Sherry and Monica Green, and his youngest daughter, Jacqueline Dennison.

Furthermore, throughout January, February and March, the Court met with counsel on numerous occasions to discuss settlement. Some of these sessions were, in fact, *requested by counsel.*

It was only after the Court sent out its March 4, 1993 Notices of the March 25, 1993 Scheduling Conference, during a meeting requested by two attorneys to discuss settlement progress in which the Court reiterated that it would not approve a settlement which provided for "back-door" payment of attorneys' fees by the clients and which would not allow the Court to return excess

monies to the City, that counsel asserted their position that no case in controversy existed since January 7th, and therefore, the Court had been divested of jurisdiction over this matter.

Having actively proceeded *in this Court* with the case through the filing of pleadings and appearances at conferences since January 7, 1993, the parties may not now, three months later, argue that no case has existed since January 7. By their actions, counsel have waived any right they may have had to rely upon the Stipulation of Dismissal simply because they have been unsuccessful in their attempt to get this Court to approve their proposed settlements.

3. The Court May Ignore a Stipulated Dismissal To Determine Whether There Has Been an Abuse of the Judicial Process

It is well-settled that federal courts have the inherent power to act to prevent abuse, and the court's actions under its inherent powers can be "as extensive and efficient as may be required by the necessity for their exercise." *United States v. Mercedes-Benz of North America, Inc.*, 547 F. Supp. 399, 400 (N.D. Cal. 1982), *quoting, Gumbel* v. *Pitkin*, 124 U.S. 131, 146 (1888). Thus, while the filing of a stipulation of dismissal may generally be effective automatically without judicial approval, the court, exercising its inherent powers, may look behind it to determine whether improper motive or conduct gave rise to the dismissal. *Mercedes-Benz, supra. See also, Thomsen* v. *Terrace Navigation Corp.*, 490 F.2d 88 (2nd Cir. 1974); *Gregg Communications Systems, Inc. v. American Telephone and Telegraph Co.*, 98 F.R.D. 715, 718 (N.D. Ill. 1983).

In *Mercedes-Benz*, the parties involved in antitrust litigation

filed a stipulated dismissal. The following day, the court ordered the parties to submit briefs on whether the requirements of the Antitrust Procedures and Penalties Act were invoked by the filing of the dismissal. The court determined that its inherent powers entitled the court to assess the circumstances giving rise to the dismissal:

> It is fundamental that federal courts have inherent power to 'prevent abuse, oppression, and injustice . . . as extensive and efficient as may be required by the necessity for their exercise and [it] may be invoked by strangers to the litigation' or sua sponte. *Gumbel v. Pitkin*, 124 U.S. 131, 146, 8 S. Ct. 379, 384, 31 L.Ed. 374 (1888). *While the filing of a stipulation of dismissal is effective automatically and does not require judicial approval, the court, exercising its inherent powers, may look behind it to determine whether there is collusion or other improper conduct giving rise to the dismissal. See Thomsen v. Terrace Navigation Corp.*, 490 F.2d 88 (2d Cir. 1974) (court has inherent power to set aside voluntary discontinuance where attorney settled and dismissed action without agreement of his client.)
>
> *The court's power is appropriately exercised where the action is one imbued with public interest.*

547 F. Supp. at 400.

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Even the cases relied upon by counsel here for the proposition that a properly executed stipulation of dismissal pursuant to Fed. R. Civ. Pro. 41(a)(1) generally precludes further court action acknowledge that even under those circumstances, the courts maintain jurisdiction for the purpose of setting aside the dismissal pursuant to Fed. R. Civ. P. 60(b) and reopening the case. *See e.g.*, *Hinsdale* v. *Farmers National Bank & Trust Co.*, 823 F.2d 993 (6th Cir. 1987) *Smith* v. Phillips, *supra*, 881 F.2d 902, 904; *McCall-Bey v. Franzen*, 777 F.2d 1178, 1185-1190 (7th Cir. 1985) ("An unconditional dismissal terminates federal jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal within the scope allowed by [Fed. R. Civ. P.] 60(b)."). *See also United States v. Transocean Air Lines, Inc.*, 356 F.2d 702 (5th Cir. 1966). *Crawford v. Loving*, 84 F.R.D. 80 (E.D. Va. 1979) (setting aside a stipulated dismissal because the court has a duty to scrutinize the settlement to protect the interests of an incompetent party).

In the instant action, counsel have been engaged — almost from the inception of this lawsuit — in what can only be characterized as "forum shopping" and bad faith dealing with the Court.

In this Court's view, counsel's machinations are a clear abuse of the judicial process that cannot, and will not, be condoned. Therefore, even if the January 7, 1993 stipulated dismissal had been properly executed, this Court, in the exercise of its inherent power to act to prevent abuse of the judicial process, would nonetheless order that the dismissal be set aside.

Such close scrutiny of the dismissal here is bolstered by the *Mercedes-Benz* case which made clear that it is particularly important for a court to closely examine a stipulated dismissal

"where the action is one imbued with the public interest." 547 F. Supp. at 400. Whereas the *Mercedes-Benz* court recognized the public interest in antitrust settlements, this Court finds the public interest in the settlement of a case involving millions of taxpayer dollars to be just as crucial.

For all of the foregoing reasons, the Court finds that it has not been divested of jurisdiction over this action by the filing of Ms. Brandy's and Mr. Quinn's Stipulation of Dismissal on January 7, 1993.

B. CONDUCT OF COUNSEL IN THIS CASE

This lawsuit is about a tragedy — a tragedy for Malice Green's family and friends, a tragedy for the City of Detroit and the community at-large, and a tragedy for the Detroit Police Department and the law enforcement community as a whole.

Yet this Court has observed, in the conduct of counsel, little, if any, human sensitivity, compassion or understanding for the underlying personal, client or community interests raised by this case. Rather, without attempting to deal seriously or substantively with any of the difficult issues raised in this case or its settlement, counsel's conduct has been dedicated to two objectives: First, sweeping this matter under the rug with as little public and judicial scrutiny as possible; and, second, maximizing attorneys' fees for an ever growing number of attorneys who have done little, if any, real legal work on this case.

The blatant forum shopping and ping-ponging between the federal court and the state circuit and probate courts engaged in by counsel as they search for a court which will, without public

scrutiny, rubber-stamp their settlement and attorneys' fees is both offensive to this Court and not in the interests of the clients on either side of this case.

With respect to the proposed beneficiaries, the Court is of the view that their attorneys are putting their own desire for an excessive and disproportionate fee award ahead of their clients' interest in reaching a fair and expeditious settlement of the case. It is not an exaggeration to say that, in its discussions with counsel, the Court has clearly indicated that the amounts and allocations proposed for the beneficiaries, if supported by the record evidence the Court indicated it would require, are not, on their face, unreasonable. Rather, the obstacle to proceeding with formal consideration of a settlement proposal has been, almost from the beginning, the amount of the proposed attorneys' fees relative to the value of the legal services provided and the unwillingness of counsel to agree that the Court must have discretion to review and award attorneys' fees independently from the substantive awards to the beneficiaries.

Perhaps even more curious and disturbing is the conduct of the City's attorneys and its law department. Rather than agreeing with the Court's suggested settlement approach and negotiating for a settlement structure which while fairly and adequately compensating the beneficiaries, gave the Court the discretion to return some of the proposed attorneys' fees to the City and its taxpayers if the Court found the fees excessive, the City's attorneys have simply thrown in with their opposing counsel and advised the Court that they are in agreement with the approach which would not give the Court discretion to return monies to their client and its taxpayers.

The Court does not question the City's judgment or good

faith in desiring to reach an early resolution of this case. What the Court does question is the City's willingness to simply acquiesce in an extravagant award of attorneys' fees to opposing counsel, financed by the City's taxpayers, when the judge has clearly indicated that the basic settlement to the parties in interest was not a primary problem, but that the judge wished to have the option of returning some of the excess monies to the City, rather than paying it to opposing counsel.

In a City which cannot provide basic services to its citizens and which is laying off some of its employees, and asking others to take pay reductions, the acquiescent position taken by the City's attorneys is, quite simply, incomprehensible.

Equally offensive to the Court is counsel's abuse of the Court and its resources in their conduct of this case. For more than three months, the Court has patiently worked with counsel, attempted to help with settlement, and granted extensions of time in order to facilitate settlement discussions. As the Court has indicated earlier in this Opinion, all counsel have dealt with the Court through both their filing of substantive pleadings and appearances, and their active participation in settlement discussions, as if this case were properly pending before this Court. There were no pleadings or motions or briefs filed to the contrary until it became clear to counsel that the Court would not approve the attorneys' fees they proposed. Indeed, a number of counsel specifically objected to the attempted dismissal and argued it was ineffective. For counsel to now take the position that the Court was divested of jurisdiction on January 7th, more than three months ago, is not only unprofessional, but is an affront to the integrity of the Court and the judicial process.

The Court well understands that counsel want and need

judicial approval of the settlement so that prospects for its approval would be enhanced when it was proposed to the Detroit City Council. But, this court cannot, and will not, permit its offices or the judicial process to be so shabbily abused.

The Court is also troubled by the multiplication and duplication of lawyers this case seems to have occasioned. There are two, three and four different lawyers representing the same persons, allegedly in different capacities or as "co-counsel".[17] [See Appendix B.] If this were a football game, the referee would assess a game misconduct penalty for "piling on".

The Court would remind counsel, although they should not need reminding, that this lawsuit is about their clients' interests, not their attorneys' fees.

In this Court's view, it is time for counsel to stop playing jurisdiction games with the Court and begin dealing with it straightforwardly. It has been suggested to the Court by counsel that, if all the parties agree upon a settlement, then it is beyond the Court's proper role to reject the settlement, even if the court's only basis for rejection is the attorneys' fee aspect of the settlement.

The Court rejects this argument. First, the statute regarding court approval of a wrongful death action settlement such as this contains, neither directly nor by implication, such a restriction. To the contrary, the statute broadly provides that if a settlement is proposed to the court, ". . . the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement." M.C.L. § 600.2922(5).

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17. One Attorney has even appeared as "co-counsel on behalf of co-counsel for co-personal representative Edniquech Grubbs."

Appendix D

Beyond this, the Court believes that review and approval of attorneys' fees, as an independent part of a settlement proposal, is singularly within the province of the court. Attorneys serve as officers of the court and, although their advocacy and representational obligations are to their clients, their duties of candor, conduct, competency and professionalism run directly to the court. The Court is in a unique position to evaluate the value of the attorney's services, both in the context of the particular case before it, and in the more general context of the value of their legal services in the community at large.

The Court believes this is particularly true where one of the settling parties is a public entity and the attorneys' fee award is being financed by public funds. For the Court to simply rubber-stamp a settlement award of attorneys' fees would be an abdication of its responsibility to the public.

However, in an effort to be constructive as well as critical, the Court will offer two alternatives. First, if counsel truly believe settlement is now in the best interests of their clients, they may formally submit to the Court the most recent settlement they have informally proposed to it. The Court will consider and rule upon the settlement package in two parts: first, the portion compensating the claimants for their loss and allocating settlement proceeds amongst them; and second, the portion compensating the attorneys for their services.

If counsel disagree with the Court's ruling on either or both portions, counsel may then appeal either one or both decisions to the Court of Appeals.

This approach has the distinct advantage of holding out the strong prospect that at least the interests of the parties — as

opposed to the interests of the attorneys — can be resolved and put to rest. If counsel are then correct in their belief that the Court is without authority to approve their fees independently from the substantive damage awards to their clients, counsel can visit this issue with the Court of Appeals without retarding or jeopardizing their clients' interests.

In the alternative, counsel may take the settlement proposal and present it to the Detroit City Council for approval. It is, after all, the City Council members who are the elected representatives of the City's attorneys' true client — the people of the City of Detroit. If the Council, after full consideration, approves the settlement proposal, the attorneys may bring it back to the Court for consideration. The Court is fully aware that it is not a popularly elected or representative official, and if the City's elected officials give the settlement their blessing, the Court will give that decision great weight.

IV. CONCLUSION

For the reasons that the Court has set forth in this Opinion, the Court finds that it has had, and continues to have, jurisdiction over this case, and that neither the "Notice of Voluntary Dismissal" filed December 14, 1992 nor the "Stipulation to Dismiss" filed January 7, 1993 operated to effectuate dismissal of this action.

s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge

DATED: APR 13 1993

Appendix D

APPENDIX A

The December 22, 1992 proposed settlement calls for the following distribution:

(1) ***Rose Mary Green,*** *the decedent's widow* will receive an initial payment of $300,000. Commencing March 1, 1993, she is to receive a monthly payment of $1,000 for the rest of her life with a three percent escalator factor (guaranteed for ten years). Commencing March 1, 2003, she is to receive an additional $1,000 per month for the rest of her life (also guaranteed for ten years with a three percent escalator factor). Beginning March 1, 2013, she is to receive as additional monthly payment of $1,175 for life with a three percent escalator factor. Ms. Green was also to receive two deferred lump sum payments: on March 1, 1998 in the amount of $100,000, and on March 1, 2005 in the amount of $100,000. *The present value of Ms. Green's settlement package was* ***$844,500.***

(2) ***Edniquech Grubbs,*** *the decedent's eldest natural daughter,* was to receive an initial cash payment of $170,000. Beginning March 1, 1993, she was to receive a monthly payment of $2,690, guaranteed for four years with a four percent escalator, to terminate at the end of four years. Commencing August 1, 1993, she was to receive four annual payments in the amount of $14,500, with a four percent escalator clause. Commencing March 1, 1997, she was to receive a monthly income of $1,800, to terminate at the end of four years and guaranteed for four years, with a four percent escalator. Commencing March 1, 2001, she was to receive a monthly benefit of $2,000 for life, guaranteed for four payments, with a four percent escalator. On February 1, 2005, she was to receive a lump sum payment of $65,000, and on February 1, 1010, a lump sum payment of

$70,000. *The present value of Ms. Grubbs' settlement package was* ***$859,823.***

(3) ***Jacqueline Dennison,*** *the decedent's other natural daughter* was to receive an initial cash payment of $94,000. Commencing March 1, 1993, she was to receive $1,527.50 per month for eight years, guaranteed for eight years with a four percent escalator. In addition, she was to receive a life-time benefit of $1,750 monthly, scheduled to commence August 1, 2001, guaranteed for fourteen years with a three percent escalator. Commencing August 1, 2001, she was to receive four annual payments of $12,000, with an escalator factor of four percent. She was also to receive three deferred lump sum payments: $100,000 on August 4, 2000, $60,000 on February 1, 2005, and $70,000 on February 1, 2010. *The present value of her package was* ***$642,546.***

(4) ***Zitayvia Anderson,*** *the decedent's granddaughter (Ms. Grubbs' daughter,* was to receive a life-time benefit commencing March 1, 1993, in the amount of $350, guaranteed for six years with a three percent escalator, and commencing March 1, 1999, a monthly life-time benefit of $550, guaranteed for 14 years, with a two percent escalator. On March 1, 2010, she was to receive the first of four annual payments of $10,000, with a three percent escalator, and on March 1, 2015, a deferred lump sum in the amount of $20,000. *The present value of her package was* ***$211,470.***

(5) ***Joshua Pitts,*** *the decedent's step-son (Ms. Green's* natural son), was to receive a life-time monthly benefit of $350, scheduled to commence March 1, 1993, with a one percent escalator, and a second life-time benefit to commence March 1, 1999, in the amount of $500 per month with a one percent

escalator. He was also scheduled to receive four annual payments of $10,000, with a one-percent escalator to commence on August 1, 1998, and a deferred lump sum payment in the amount of $20,000 on March 1, 2005. *The present value of his package was **$176,500**.*

(6) ***Lachieta Miller and Shakietha Strawter,** the decedent's step-daughters (Ms. Green's natural daughters),* were to each receive a life-time benefit of $750 per month, to commence March l, 1993 with a one percent escalator. *The present value of each of their packages was **$148,500**.*

(7) ***Patricia A. Green,** the decedent's mother, was to receive a lump sum payment of **$200,000**.*

(8) ***Jessie Green, Jr.,** the decedent's father, was to receive a lump sum payment of **$150,000**.*

(9) ***Ollie Frye,** the decedent's grandmother, was to receive a lump sum payment of **$25,000**.*

(10) ***Sherri Green, Monica Green, Treise Green,** the decedent's sisters, **and Peggy Wright,** the deceased's half-sister, were to each receive a lump sum payment of **$39,685**.*

(11) The decedent's estate was to receive $5,000 to cover funeral and related expenses.

(12) The City of Detroit was to pay $5,400 to purchases the different annuity policies.

(14) As proposed, **the attorneys,** ***Ms. Brunetta Brandy and Mr. Ernest Jarrett** (co-counsel for co-personal representative*

Rose Mary Green) were jointly to receive ***$1,461,000*** *and Mr.* ***Gerald Thurswell*** *(counsel for co-personal representative Edniquech Grubbs and for the decedent's parents, sisters, and youngest daughter) was to receive* ***$210,000.***

Appendix D

APPENDIX B

CLAIMANTS AND THEIR COUNSEL IN THE MALICE GREEN CASE

Rose Mary Green

A. In her capacity as co-personal representative:

1. Brunetta Brandy (12/22/92)
2. Ernest Jarrett (12/22/92)

B. In her individual capacity:

1. Brunetta Brandy (12/22/92)
2. Ernest Jarrett (12/22/92)
3. Kenneth Hylton (4/2/93)

Edniquech (Eneatra) Grubbs

A. In her capacity as co-personal representative:

1. Gerald Thurswell (withdrawn 3/4/93)
2. Brunetta Brandy (1/7/93)
3. Saunders V. Dorsey (1/15/93)
4. Jerome P. Barney (2/1/93) ("on behalf of the co-personal representative.")
5. Cyril C. Hall (3/31/93) ("Appearance as co-counsel on the behalf of Co-Counsel for Co-Representative Edniquech Grubbs")

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B. In her individual capacity:

1. Gerald Thurswell (withdrawn)
2. Jerome P. Barney (signed the response to Show Cause Order as representing her in her individual capacity)

Jacqueline Dennison (via her mother — Kim Nihiser)

1. Gerald Thurswell (withdrawn)
2. Joseph W. Phebus (1/14/93)

Patricia Green (mother) and Jessie Green, Jr. (father)

1. Gerald Thurswell (withdrawn)
2. Justin Ravitz (1/4/93)

Treise, Monica and Sherry Green (sisters)

1. Gerald Thurswell (withdrawn)
2. Justin Ravitz (1/4/93)

Peggy Wright (half-sister)

1. Gerald Thurswell (withdrawn)
2. Thomas A. Ricca (4/2/93) (in her capacity as personal representative)

Ollie Frye (grandmother)

1. Gerald Thurswell (withdrawn)
2. Justin Ravitz (1/6/93)

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Zitayvia Anderson (Ms. Grubb's daughter)

? ? ?

Step-children (Rose Mary Green's children) (Joshua Pitts, Lachieta Miller, and Shakietha Strawter)

? ? ?

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED JUNE 6, 1997

No. 95-1940

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROSE MARY GREEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF MALICE WAYNE GREEN, DECEASED,

Plaintiff-Appellee,

JESSIE GREEN, JR., ET AL.,

Claimants-Appellees,

ERNEST L. JARRETT (95-1940); BRUNETTA BRANDY (95-1941), ATTORNEYS,

Movants-Appellants,

v.

LARRY NEVERS, ET AL.,

Defendants.

ORDER

BEFORE: LIVELY, MERRITT, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original

panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX F — RELEVANT RULES AND STATUTES

Court Rules of Michigan:

Rule 8.121 Contingent Fees in Claims or Actions for Personal Injury and Wrongful Death

(A) Allowable Contingent Fee Agreements. In any claim or action for personal injury or wrongful death based upon the alleged conduct of another, in which an attorney enters into an agreement, expressed or implied, whereby the attorney's compensation is dependent or contingent in whole or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than the fee stated in subrule (B) is deemed to be fair and reasonable. The receipt, retention, or sharing of compensation which is in excess of such a fee shall be deemed to be the charging of a "clearly excessive fee" in violation of Canon 2, DR 2-106 (A) of the Code of Professional Responsibility and Canons.

(B) Maximum Fee. The maximum allowable fee for the claims and actions referred to in subrule (A) is one-third of the amount recovered.

(C) Computation. The amount referred to in subrule (B) shall be computed on the net sum recovered after deducting from the amount recovered all disbursements properly chargeable to the enforcement of the claim or prosecution of the action. In computing the fee, the costs as taxed and any interest included in or upon the amount of a judgment shall be deemed part of the amount recovered. In the case of a settlement payable in installments, the amount referred to in subrule (B) shall be computed using the present value of the future payments.

* * *

Appendix F

Revised Probate Code:

700.543. Employment of counsel

Sec. 543. Without obtaining a court order, a fiduciary of an estate may employ counsel to perform necessary legal services in behalf of the estate and the counsel shall receive reasonable compensation for the legal services.

Revised Judicature Act:

600.2922. Wrongful death

Sec. 2922. (1) **Liability of tort-feasors; exclusiveness of remedy.** Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances that constitute a felony.

(2) **Actions in name of personal representative; service of complaint and notice.** Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased person.

* * *

(5) **Motion for settlement; hearing.** If, for the purpose of settling a claim for damages for wrongful death where an

action for those damages is pending, a motion is filed in the court where the action is pending by the personal representative asking leave of the court to settle the claim, the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement.

(6) **Damages; distribution.** In every action under this section the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows:

* * *

(e) If none of the persons entitled to the proceeds is a minor, a disappeared person, or a legally incapacitated person and all of the persons entitled to the proceeds execute a verified stipulation or agreement in writing in which the portion of the proceeds to be distributed to each of the persons is specified, the order of the court shall be entered in accordance with the stipulation or agreement.

* * *

(9) **Settlement; distribution of proceeds.** If a claim under this section is to be settled and a civil action for wrongful death is not pending under this section, the procedures prescribed in

sections 221 and 222 of the revised probate code, Act No. 642 of the Public Acts of 1978, being sections 700.221 and 700.222 of the Michigan Compiled Laws, shall be applicable to the distribution of the proceeds.

Organization of Courts

28 U.S.C. § 455: Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

28 U.S.C. § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the

belief that bias or prejudice exists, and shall be filed not less that ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Michigan Rules of Professional Conduct:

Adopted by order of the Michigan Supreme Court effective October 1, 1988.

Rule 1.5 Fees.

* * *

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised of and does not object to the participation of all lawyers involved; and

(2) the total fee is reasonable

* * *

Appendix F

Federal Rules of Civil Procedure

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

* * *

Supreme Court, U.S.
FILED
OCT 14 1997
CLERK

No. 97-439

In The

Supreme Court of the United States

October Term, 1997

ERNEST L. JARRETT, Attorney,
Petitioner,

vs.

ROSE MARY GREEN, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The gravamen of Respondent's argument in this instant matter is that Appellant, Ernest Jarrett, has acted in contravention of the Estate's interest, the interest of other affected parties, and all involved here before this Court. This foundational premise is critical to Respondent's argument because an understanding of Petitioner's conduct and own self-interests elucidates the issues in this matter. First of all, as the District Court raised in its rulings, Jurisdiction was proper before this Court from the time of Attorney Brandy's filing of her alleged "well-pled" complaint, which set forth causes of action and claims against **all** Defendants on federal jurisdictional bases. A cursory view of the Complaint (R. 10 - Complaint) clearly establishes this fact alone. From this point, jurisdiction, although numerously tested and challenged, withstood any judicial muster or scrutiny. After the Defendant City of Detroit removed the action, none of the parties in this case, including this Respondent, ever challenged the removal or overcame any allegations that removal was defective. Further, the remand of this case was improper.

Subsequently, Petitioner's failed attempt at raising a Fed.R.Civ.P 41(a)(1)(i) Stipulation of Dismissal was damnum and improper from its inception. It failed to comply with the standards under the rule where only Attorney Brandy, who was wholly incapable of representing or binding the estate at that time, and Defendant executed same. On several bases, the District Court found that it properly had jurisdiction and properly maintained it throughout the course of the proceedings. Further, the conduct of the parties acquiesced in the court's jurisdiction while simultaneously protesting the jurisdiction.

This Respondent submits that the only reason

jurisdiction continued to be challenged by Attorneys Brandy and Jarrett below and why Attorney Jarrett continues to waste the court's time arguing this issue now goes back to this Respondent's premised argument, that Petitioner is only acting in his own selfish interests, towards the dereliction of the interests of everyone else, including and especially considering, his own client.

This attorney, in large part, entered this case to prevent and thwart the inimical and inapposite effects of Attorneys Brandy and Jarrett, after a co-personal representative clearly saw such damaging efforts and fled to retain this attorney. The height of Attorneys Brandy and Jarrett's conduct was evidenced by co-personal representative Ms. Grubbs' discharge of Jarrett and Brandy. However, the evident shame of their conduct is shown where their only remaining client, Rose Mary Green, discharged them, citing her distrust of their behavior.

The other arguments this Respondent submits pertain to the issue of attorneys fees. And, since the law clearly addresses this issue, and imposes a valuation of quantum meruit to determine the remaining distribution of fees, the only remaining issue is the actual division.

Respondent seeks, that in light of Petitioner Jarrett's unethical, outrageous, mad, reprehensible and contemptible behavior in the lower court and in this appeal, that his portion of the attorneys fees be reverted to the estate for an additional distribution to the estate, including Respondent, Edniquech Grubbs and her family. Based on the supportive and assertive factual and legal basis that follows in this Brief, it is submitted that the lower court's ruling be adhered to with an Order reflecting the above modification as set forth herein.

REASONS TO DENY PETITIONERS REQUEST FOR A WRIT OF CERTIORARI

I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY MAINTAINING JURISDICTION PURSUANT TO 28 USC §1343(3)?

Petitioner has averred in his appeal that the district court, presided by the Honorable Gerald Rosen, did not and never had subject matter jurisdiction over this matter because the only federal claims asserted in Plaintiff's Complaint were asserted against the individual police officer defendants, who were never served or appeared in the case. Accordingly, Petitioner's argument is that only the individual defendants could have removed the action.

However, Petitioner's argument is improperly and erroneously grounded on the theory that the stipulation for dismissal, entered into by Attorney Brandy and Mr. Quinn only, on behalf of the City, effectively relinquished jurisdiction from the district court. Jurisdiction had, effectively, been consented to by the interested parties, his own client, and the overall conduct of the attorneys.

Petitioner's argument is without merit and not grounded in the controlling facts and law of this case. Furthermore, without proceeding to directly address the governing rules and case law in this matter, it is submitted that Petitioner's arguments are no more than mere subterfuge to mask his selfish interests in pursuing the original requested attorneys fee amount of 1.2 million dollars and in prohibiting this counsel from receiving his share of the attorneys fees, although through oral and written edicts of the district court, Brandy and Jarrett are not legally entitled to the fees under their original phallus contingency agreements and,

furthermore, the district court has found that Attorney Dorsey is entitled to the reasonable value of his services, in quantum meruit.

Petitioner's translucent actions are clearly seen and evidenced by the structure of his arguments in his appeals and in his actions in the lower court where he, *inter alia*, sought competing jurisdiction in circuit and probate court in derogation of the interests of other parties, including his clients, where he constantly worked against the guise of the district court, where he attempted to prevent this attorney from critical negotiations with the City Council, and where he attempted to engage such procedural and ethical flaws as setting up the escrow account and issued checks in the name of Rose Mary Green only, who served as only one of the co-personal representatives.

Petitioner's actions have been methodical in pursuing his attorneys fees, either directly or vis-a-vis this feigned jurisdiction argument.

Petitioner cannot establish that the 'Removal' was defective

The applicable law evidencing the weakness of Petitioner's argument was set forth in Judge Rosen's Opinion and Order dated November 7, 1994. (R. - Memorandum Opinion and Order, 11/7/94, p. 8). As set forth in Judge Rosen's Order, the allegations in Plaintiff's well-pled complaint under Count IV and V were sufficient to allege a Section 1983 deprivation of civil rights claim against the City under Monell v Department of Social Services, 426 US 658; 98 Sct 2018 (1978); City of Canton v Harris, 489 US 378; 109 Sct 1197 (1989), and Marchese v Lucas, 758 F2d

181(6th Cir 1985), cert. denied, 480 US 916 (1987).[1] Further, well-established precedent of United States Supreme Court cases and the Sixth Circuit Court of Appeals cases in Arcadia Women's Health Center v Operation Rescue, 929 F2d 530, 534 (9th Cir. 1991), establishes the general principle that:

> "[t]he relevant jurisdictional question from the result of these proceedings is not propriety of removal, but only whether the federal district court would have had original subject matter jurisdiction had the case been originally filed in the federal court."

The Supreme Court in Grubbs v General Electric Credit Corporation, 408 US 699; 92 Sct 1344; 31 Led2d 612 (1972), further expounded the general principle. The court explained:

> Long-standing decisions of this Court make clear, [that] where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in the court.

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[1] Count V was captioned "Deprivation of Constitutional Rights by Individual Defendants", however, it is critical to note that it incorporated by reference County IV, "Negligent Training and Supervision," which was directed against the City of Detroit, the party who was actually served and who appeared in this action.

In Morda v Klein, 865 F2d 782 (6th Cir 1989), the Sixth Circuit adopted the rationale of the Grubbs rule in the context of a defective removal under federal question jurisdiction of a RICO action, explaining:

> The *Grubbs* rule is eminently sensible, and conservative of judicial economy; it prevents a party who waits until after he loses in the Court below to object to the jurisdictional defect from getting a second bite at the apple. Provided that the district court, as here, would have had original jurisdiction had the action been filed in the first instance in the federal court and would have had jurisdiction at the time of final judgment it works no expansion of federal jurisdiction.

Factually, at no time did the Petitioner raise this 'defective removal' argument following the Defendant City of Detroit's timely filing of its removal action. As such, Petitioner is, in essence, estopped now from raising this defense for failure to satisfy the time limitations under Fed.R.Civ.P. 1447(c).[2] Moreover, Petitioner never raised this argument at any time thereafter during the course of the proceedings.

Counsel submits that such action was not raised during the appropriate time limitation following the City of

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[2] Fed. R. Civ. P. 1447(c) provides
> "[a] motion to remand on the basis of any defect in removal procedure must be made within thirty (30) days".

Detroit's removal because Petitioner believed that he could obtain an anticipated "stamped" approval of the settlement and award of originally requested attorneys fees of over a million dollars. Now, Petitioner seeks to raise this argument because as the court set forth in *Morda*, supra, the parties are attempting to get their second bite of the apple attorneys fees by divesting the district court of jurisdiction and hoping to maybe present his request for attorneys fees before a more amenable court.

The facts in this case are not wholly distinguishable from the cases relied upon in support of this counsel's argument herein. As such, where this action was removed to the district court on the basis of federal question jurisdiction under the IV, V, VIII, and XIV Amendments of the United States Constitution and 42 USC, sec(s), 1983, 1985, 1986 and 1988, the federal district court would have had original federal jurisdiction over this action anyway. Based on this, Petitioner's argument is incredulous, and he cannot now argue that the district court lacks jurisdiction over this case on improper removal grounds.

Fed. R. Civ. P. 41(a)(1) Stipulation to Dismiss

Petitioner further contends that the submitting of the January 7, 1993, Voluntary Stipulated Order of Dismissal pursuant to Fed.R.Civ.P. 41(a)(1)(ii), effectively dismissed the case and divested jurisdiction from the district court. (R.10 - Stipulation). Petitioner's argument fails for two (2) reasons: First, the Voluntary Order of Dismissal was not in compliance with the rule it was brought under and secondly, the parties continued to voluntarily act by their own conduct and actions, under the aegis of the Court, evincing a contrary characterization of the status of the case.

Fed.R.Civ.P.41(a)(1) provides, in pertinent part, that an action may be dismissed *"by having all the parties who have appeared in the action sign a stipulation of dismissal"*. [FRCP 41(a)(1)(ii)] However, the determinative language of the rule requires that *"all parties in the action"* sign the dismissal. This language is literal and does not suggest interpretation. If we were to accept the continuum of Petitioner's argument as true, the stipulation is still ineffective and facially incompliant where it was only signed by Anthony Quinn, the attorney for Defendant City of Detroit, and Attorney Brandy only, who, as the record established below evinces, was not even representing co-personal representative Edniquech Grubbs at the time of the execution.[3]

At the time of the filing of the dismissal, Attorney Thurswell effectively remained co-counsel of record for Edniquech Grubbs in both her individual and co-personal

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[3] On January 5, 1993, a Proposed Order for Stipulation of Attorneys was filed by attorneys Brandy and Thurswell for Edniquech Grubbs, which was *never entered with the Court*.

At the 11th hour on January 7, 1993, an Appearance for Edniquech Grubs was filed by Attorney Brandy. (R.9 - Appearance). At or around the same time, Attorney Thurswell's Motion to Withdraw had not even been ruled on yet by the Court. (R.3 - Motion). This, in effect, meant that at the least, Attorney Thurswell's signature should have appeared on the Order for Dismissal. The other effect is that it limited Attorney Brandy's capacity and ability to execute the Order of Dismissal for the 'parties' she claim were necessary. In light of these factors, the Order of Dismissal was defective and could in no way render effect dismissing the case or divesting the jurisdiction from the Court

representative capacity. In this regard, he should have also executed the Stipulation of Dismissal. In the absence of this, same was defective. Additionally, Attorney Phebus, who represented Jacqueline Dennison, plaintiff's decedent's daughter, had not executed the Stipulation of Dismissal either and also expressed objections to the entry of the Order.[4]

In the absence of these attorneys having executed the Stipulation of Dismissal, many of the parties, who were ***necessary*** parties to be included in the plain reading of Fed.R.Civ.P.41(a)(1), in the Michigan Wrongful Death Act, MCLA 600.2922, and under leading case law such as United States v Mansion House Center North, 95 FRD 515 (ED Mo 1982).

Where necessary "parties in interest" had not participated in or had the Dismissal executed by their respective counsels, the Stipulation was clearly not in compliance with Fed.R.Civ.P.41(a)(1), hence not giving effect to the dismissal.

As to their conduct, the parties, including this attorney, continued under the guise and direction of the district court as to negotiations, distribution, hearings, approval of the consent agreement and other essential matters critical to the resolution of this case. This attorney submits, that with respect to such conduct by ratification, the parties should not now be able to bring this jurisdictional argument.

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[4] As of January 7, 1993, Attorney Phebus had not formally entered his appearance, but had apprised the Court that he would be engaging same and, he also expressed objections to the Order on the grounds that his client's interests would be greatly affected.

The Court's "Inherent Powers"

In addition to the sources of authority that were exercised in the procession of the lower court proceeding, the Court also had and properly exercised its *"inherent powers"*. Judge Rosen, in the Order and Opinion dated May 13, 1993, stated that a federal court may "exercise it's inherent powers to prevent abuse," and that such power may be, "as extensive and efficient as may be required by the necessity for their exercise," including "exercising its inherent powers to look behind a stipulation of dismissal to determine whether proper motive or conduct gave rise to the dismissal." (R.34 - Opinion and Order Re: Jurisdiction). United States v Mercedes Benz of North America, Inc., 547 FSupp 399, 400 (ND Cal 1982), quoting Gumbel v Pitkin, 124 US 131, 146 (1888); Thomsen v Terrace Navigation Corp., 490 F2d 88 (2d Cir 1974).

The exercise of this authority was further delineated in Kokkonen v Guardian Life Insurance, ____ US ____; 114 Sct 1673 (1994), made clear that a district court could retain jurisdiction over post-jurisdiction matters if it so provided in entering the judgment under its inherent powers. The Court stated:

> "[E]ven when as occurred here, the dismissal is pursuant to Rule 41(a)(1)(ii) (which does not by its terms empower a district court to attach conditions to the parties' stipulation of dismissal) we think the Court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree. [114 Sct at 1677].

Further, in Downey v VanderLaan, ____ F3d ____; 1994 US App LEXIS 18622 (6th Cir 1994), the Sixth Circuit adopted the *Kokkonen* reasoning that a district court is authorized to enforce a settlement after entry of judgment if it expressly retained jurisdiction.

Based on the analysis as set forth, *supra*, this Court did expressly retain jurisdiction and the parties, through their respective representation, in effect, if not by express acceptance, acceded and/or ratified the jurisdiction of the lower court. Moreover, the parties often looked to the deference of the Court in proceedings on several matters.

Although in *Kokkonen*, the district court retained jurisdiction after a dismissal had been granted, this fact does not distinguish the case from our case *sub judice*, where the consent agreement operated legally with the same effect, where it released the Defendant City of Detroit and the named individuals from the matter and where the proceeds would be distributed pursuant to post-judgment motions. *Any arguments now by the Petitioner against the jurisdiction of the lower court are disingenuous, anomalous, and inapposite to the governing* law and evolution of the facts in this case.

II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY SETTING ASIDE THE CONTINGENCY FEE CONTRACTS AND AWARDING THE REMAINING ATTORNEYS FEES ON A QUANTUM MERUIT BASIS?

The Petitioner argues that the reduction of attorneys fees as outlined in the District Court's Final Opinion is improper because of his alleged valid contingency fee arrangement with the Estate of Malice Green, granting him 1.2 million dollars. However, based on the laws and facts as

outlined in this case, the District Court held that this argument was without merit and insupportable, and on the tenets of the arguments and law submitted in substantive pleading by this attorney, ruled that the attorneys fees to be paid to the remaining attorneys be allocated in quantum meruit, for the reasonable value of their services.

Under Michigan law, an attorney working under a contingency fee agreement who is discharged or withdraws is entitled to compensation for the reasonable value of his services based on quantum meruit. James v Blum, 793 F2d 1292 (6th Cir 1986); Law Offices of Stockler, P.C v Semaan, 135 Mich App 545, 550 (9184); Ambrose v Detroit Edison Co., 65 Mich App 484, 491-492 (1975). The attorney is not entitled to recover under the contingency fee contract, even if he is wrongfully discharged.

In support of the position that quantum meruit is the appropriate measure of determining the remaining attorney fees in this matter, it is necessary to trace the original and development of the facts in this case regarding the proposed contingency arrangements and the issues concerning fees. From the beginning, no valid contingency agreement contract existed. Neither Ms. Grubbs nor Rose Mary Green signed their contingency agreements in their representative capacity. The letters to each of these parties were directed in the names of "Ms. Ediquech Grubbs" and "Ms. Rose Mary Green", respectively, *in their individual and personal capacities only*. Further, there were two (2) separate contingency agreement contracts, each signed separately by the parties, of which neither purported or even surmised that they were being entered as "co-representatives" of the estate. Additionally, neither purported contingency agreement contract was approved or ratified by the Probate Court.

The law is well-established in Michigan that where two or more qualified persons are named as co-personal representatives of an estate, the signature of only one of the co-personal representatives cannot bind the estate, as a matter of law. Action Auto, Inc. v Anderson, 165 Mich 620; 419 NW2d 36, 38 (1988), *lv den'd*, 443 Mich 873 (1988). *Action Auto* delineated the issue of whether one co-personal representative, acting alone, could contractually bind the estate. In *Action Auto*, Kenneth Anderson, Sr., left a Last Will and Testament that left some property to his three sons upon his death. Although all three sons had been named co-personal representatives of the estate, one of his sons, acting alone, entered into a contract to sell the property to Action Auto, a Michigan Corporation. The contract had three signature blocks for all the co-personal representatives, but it was only executed by one of the sons.

Action Auto sued for specific performance, requesting that the court declare the sale valid and binding. The court, in denying such relief, explained, in part, adopting the Uniform Probate Code, that:

> "[I]f two or more persons are appointed co-representatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate." 8 Uniform Laws Annotated, Uniform Probate Code, sec. 3-717, p. 340 (1983)

The Court further stated:

> "We are persuaded by these authorities that Michigan should also adopt the requirement of joint action when the will is silent as to the

authority of co-personal representatives to act individually." See, also, Nichols v Pospiech, 289 Mich 324; 286 NW 633 (1939).

Rose Mary Green and Edniquech Grubbs were both appointed co-personal representatives of the Estate of Malice Green by the Probate Court. As such, assent was required by both parties to bind the estate. And, where based on the above, both parties did not jointly enter into any binding agreement for a contingency fee for Attorney Brandy where they did not have such authority.

In the alternative, an additional basis exists for denying Petitioner's argument that a contingency fee agreement existed where in the early part of the proceedings, co-personal representative, Edniquech Grubbs became dissatisfied with her representation by Attorneys Jarrett and Brandy. As the district court stated in its opinion, Ms. Grubbs became dissatisfied with her representation when it became apparent that Attorneys Brandy and Jarrett were working decidedly in favor of the Green side of the family in contravention of the blood lineage of the family. And, starkly in contrast to Attorney Jarrett's argument in his appeal that there was no evidence of Ms. Grubbs expressing objections and concerns over her representation by appellants, outside of the record establishing such evidence, it appears self-evident that Ms. Grubbs had some certain concerns where she sought out the services of this attorney only four weeks into the litigation. In support of this, the Court recognized that Edniquech Grubbs had a right to seek other legal counsel to represent the estate's interests on Ms. Grubbs' behalf and was not bound or enslaved as the Petitioner's client. Ambrose v Detroit Edison, 65 Mich App 484 (1975).[5] Accordingly, once Attorneys

[5] Ambrose v Detroit Edison, 65 Mich App 484; 237

Brandy and Jarrett were discharged by Ms. Grubbs, even if Petitioner could argue they had a binding written contingency agreement, it became ***de jure***, invalid at the time of discharge, where the co-personal representatives were clearly not acting jointly.

Grounded in this same analysis is the corollary, that once Ms. Grubbs, along with other blood lineage interested parties, expressed her objections and dissatisfaction with Petitioner's representation of her and proceeded to retain this attorney, Attorney Jarrett's claim for fee-sharing failed as well. MCR 8.121, incorporated by reference MRPC Rule 1.5 provides, in pertinent part, that:

> A division of a fee between lawyers who are not in the same firm may be made only if:
>
> 1. The client is advised of and ***does not object*** *to the participation of all lawyers involved...*
>
> 2. The total fee is unreasonable.

Without even addressing the second-prong of the rule, Attorney Jarrett's fee-sharing agreement clearly fails under the analysis and facts set forth above.

Summarily, under either analysis discussed above (*a.* No valid signed agreement, and *b.* discharge of counsel), Petitioner does not have any merit to the argument that he is entitled to fees under a contingency agreement equating 1.2 million and/or that fee-sharing of same is proper. Hence, as this attorney has urged and agreed to, the Petitioner is only

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NW2d 520 (1976).

entitled to fees for the reasonable value of his services, viz., *quantum meruit*. *Ambrose*, supra.

In *Ambrose*, the court determined that the discharged attorney was entitled to the contingent fee percentage agreed upon with his client prior to discharge. The Court of Appeals, although agreeing that it was proper to impose a lien on the settlement, determined that the trial court erred in deciding that the full contingent fee amount was to be the amount covered by the lien.

The appellant court explained:

> "[T]he majority view (in Michigan) is that an attorney on a contingent fee arrangement who is wrongfully discharged, or who rightfully withdraws, is entitled to compensation for the reasonable value of his services based upon quantum meruit, and not the contingent fee contract. The rationale for that rule was discerned in Fracase v Brent, 6 Cal3d [784], 789-790; 100 Cal Rptr [385], 388-389; 494 P2d [9], 12-13 ([1972]);
>
> > "The right to discharge is of little value if the client must risk paying the full contract price for services not rendered upon a determination by a court that the discharge was without legal cause. The client may frequently be forced to choose between continuing the employment of an attorney in who he has lost faith, or risking the payment of double contingent fees equal to the greater portion of any amount eventually recovered... Unless a rule us adopted allowing an attorney as full compensation the reasonable value of services rendered to the time of discharge, clients will often feel required to

> continue in their service attorneys in whose integrity, judgment or capacity they have lost confidence."

Edniqech Grubbs and Rose Mary Green entered into a contingency agreement with Attorney Brandy wherein Attorney Brandy and Mr. Jarrett, by way of the purported fee-sharing agreement, would receive 1/3 of the settlement that was awarded to the estate. Ms. Grubbs discharged Brandy and Jarrett early in their attorney/client relationship. In accordance with the case law, *supra*, Ms. Grubbs' agreement with Attorney Brandy and Jarrett was null and void at that juncture. *The case law speaks clearly on this issue.* If Ms. Grubbs remained bound by her initial contingency fee agreement, she would essentially be enslaved to the attorney(s) she no longer trusted in ***any*** capacity.

Michigan has adopted this above rule, as supported by the district court's opinion, and thus, the remaining attorneys should be entitled to fees from the estate of Malice Green in an amount commensurate with the reasonable value of their services, i.e. in *quantum meruit*. And, as will be outlined more fully, infra, this amount would equal 50% to Attorneys Jarrett and Brandy (as co-counsels for co-personal representative Rose Mary Green) at or around an amount of $400,000.00; and 50% to Attorney Dorsey (as sole attorney for co-personal representative Edniquech Grubbs), at or around an amount equal to $400,000.00.

Attorneys Brandy and Jarrett, as co-counsels, initially represented both co-personal representatives of the Estate of Malice Green, *Rose Mary Green* and *Edniquech Grubbs*, respectively. Initially, there was an apparent and competing conflict of interest arising out of Attorneys Brandy and Jarrett representing both personal representatives because each

representative represented different competing and contrary family members, (i.e. Edniquech Grubbs represented the blood lineage side of the family, while Rose Mary Green represented the statutory side of the family). Therefore, conflicts and problems were certain to arise between the competing factions as did eventuate and come to fruition early on in the case.

Ms. Grubbs thereinafter briefly sought the services of Attorney Thurswell who soon thereafter waived his $200,000.00 Estate fee despite his services to the Estate because of the apparent conflicts that had arisen.

Almost instantly into the case, an offer was quickly, within weeks of the tragedy, dropped in the lap of the Estate lawyers per the edict of the Mayor as a surreal form of "riot" insurance. Immediately thereafter, it became clear to Ms. Grubbs that Attorney Brandy and Ms. Jarrett were primarily interested in representing the interests of Rose Mary Green, and not Edniquech Grubbs and her side of the family. Consequently, Attorneys Brandy and Jarrett were unable to successfully reach a settlement with the City of Detroit or between the interested parties because of the continuing objections and complaints raised by Ms. Grubbs and the blood lineage side of the family. Ms. Grubbs' lack of trust in Brandy's and Jarrett's legal representation of the Estate's interest on her behalf was increasing; and, Mr. Jarrett was incapable of moving the case forward. Upon filing an appearance, this counsel began setting the case on par mirroring the ultimate resolution and agreement that resulted in this matter. First, through negotiations with Brunetta Brandy, this counsel convinced her to reduce the attorney fee by $550,000.00 and return the same to the Estate. At a meeting held in the office of Jerome P. Barney, this attorney and counsel Barney, in an effort to protect the interests of the Estate, particularly the blood lineage side of the family, urged

Brandy to reduce the 1.7 million requested attorney fee by $550,000.00 by expressing to her the belief that the attorneys fees as requested were unreasonably excessive and would be strongly resisted. It was further expressed to Brandy that the $550,000.00 should be reverted back to the Estate for a more equitable distribution among the blood lineage side of the family. Counsels also retorted to Brandy that if she persisted in seeking the full amount of the originally requested attorneys fees, that such unreasonable conduct would be brought before the Court. Brandy, at this time, agreed to reduce the fee to their now requested 1.2 million dollars.

Prior to this attorney filing an appearance, Attorney Thurswell was representing Edniquech Grubbs, as co-personal representative, and at or around the time he was discharged (four weeks into the proceeding), there still existed only an offer. Attorney Thurswell, per agreement with Attorneys Brandy and Jarrett, would have received but for his waiver thereof, an attorneys fee of $200,000.00 for his efforts on behalf of the estate. However, Attorney Thurswell did waive his fee, and at the time this attorney entered his appearance, this attorney stood in Attorney Thurswell's position, where Edniquech Grubbs left Mr. Thurswell and sought the services of this attorney.

By law, said attorney fee must be paid to this attorney by virtue of this counsel undertaking the same duties and responsibilities and more, as established in the record below.

This attorney was not only able to acquire the trust of Edniquech Grubbs so that they could work together as a team, but was instrumental in bringing this matter to its current settlement stage. Prior to this counsel's involvement, there was no meeting of the minds among and/or between the interested parties, and, the possibility of bringing this matter

to resolution had escaped the interested parties. ***At the time of this attorney's appearance in this case, this case had not been and could not have been settled*** because Ms. Grubbs had objected numerously to the settlement, distrusted Jarrett and Brandy and basically, was unrepresented by any counsel. The case could not be settled unless all the interested parties agreed on an amount, the distribution, and unless the judge agreed. Further, this attorney had to correct Attorneys Brandy and Jarrett's error of having negotiated with the City of Detroit a structured settlement, where the City's normal practice of offering a cash settlement was more appropriate for the parties in this case, considering their maturity, and by reason of the difficulty of determining the present value of structured settlements.

It should be added here that the distribution agreement was near the penny to what counsel's recommendations were once entering this action as evidenced by the numerous correspondences written to and by counsel. Settlement through all counsel's efforts hereunder, was and could have been only achieved by expending hundreds upon hundreds of hours negotiating, and meeting with attorneys and the family members of Malice Green, researching the numerous areas of law which have been raised as significant issues throughout this litigation, drafting pleadings, court appearances, and utilizing several resources at great cost and expense to counsel.

Furthermore, when this attorney entered this case, counsel has thereafter worked tirelessly reviewing, authorizing, ratifying and responding to pleadings filed by Attorneys Brandy and Jarrett on behalf of the Estate; some of which placed the Estate in potential jeopardy. Most notable was the Writ of Mandamus filed an voluntarily dismissed by

Mr. Jarrett which delayed the City Council's approval of the Consent Agreement for eighteen months. The district court urged that said approval by the City Council be sought; and instead of doing so immediately, in order to effectuate the distribution forthwith, Mr. Jarrett chose to file a frivolous pleading while the City Council was waiting for over a year to review the Consent Agreement. Ultimately, Mr. Jarrett withdrew the Writ of Mandamus and followed the initial direction of the Court. Other instances of Mr. Jarrett's counterproductive, negative, and benign conduct included seeking competing jurisdiction in the Wayne County Circuit and Probate court, risking dismissals by Defendant, seeking to have the escrow account and checks issued thereof only in the name of Rose Mary Green, contesting jurisdiction at every avail even when it became apparent that it was diminishing potential resolution of this matter. Additionally, counsel Brandy and Jarrett have practically duplicated each other's services in an amount exceeding $600,000.00 and even attempting to represent both co-personal representatives from the beginning, knowing of the clarity of the conflict of interest, but all in an attempt to maximize their fees.

Moreover, during this entire litigation process, Mr. Jarrett has attempted to exclude Ms. Grubbs from making decisions regarding her interests as co-personal representatives of the Estate by performing unilaterally and without authority on behalf of the entire estate when he and Attorney Brandy only represented half of the Estate. Now, Attorney Jarrett is seeking to exclude this attorney, as counsel for Ms. Grubbs, from obtaining duly owed attorneys fees. Counsel need not cite how courts fail to recognize or reward such activity by co-fiduciaries or their attorneys. Counsel is, in fact, entitled to an amount, in quantum meruit, equal or greater than the amounts for the attorneys representing co-personal representative, Rose Mary Green, the actual amount

to be distributed as $400,000.00 to Attorney Dorsey for his representation of one-half of the estate and $400,000.00 for Brandy and Jarrett for their representation of the other half of the estate, especially when their services were highly duplicitous and where the majority of their efforts were not devoted towards the interests of the estate, rather towards their own self-interests in pursuing the attorneys fees.

The case law provides that an attorney who is subsequently retained after the discharge of the first attorney and after an offer of settlement has been made, ***is entitled to an equal portion if not more than the first attorney***. Kidd v CSX Transportation, et al., US Dist LEXIS (1990); Stallman v Distron Corp., 803 P2d 212 (1990); Altman v Bowman, 198 Ill App 3d 329, 555 NE2d 997 (1990); Madison v Goodyear Tire and Rubber Co., 8 Kan App 2d 575; 663 P2d 663 (1983).

From the inception of this case, only four (4) weeks after Jarrett and Brandy entered the matter, this attorney met with the Court, conferenced with all of the interested parties' attorneys regarding distribution, forced Attorney Brandy to waive the $550,000.00 of the requested attorney fee or face being embarrassed in front of the Court by citing that the attorneys fee was too excessive and that the money was needed for a more equitable distribution of the shares given to the blood lineage members of the family. Contrary to appellant's assertion, Brandy's act of waiving the fee was not a charitable act on her part, but was done at this counsel's urgence. Because the amount represented a portion of fees which this attorney would have been entitled to, this counsel agreed to waive the fee as well. Additionally, this attorney greatly assisted in the distribution. The ultimate distribution had been worked out weeks in advance, initiated by this

attorney's efforts and suggestion. This attorney's recommendation for distribution was near the penny of the actual distribution reached for all the parties because it was fundamentally fair.

Additionally, this attorney reviewed the offer, changed lopsided distribution, moved settlement along through the City Council by correspondence and telephone calls, drafted and filed Motions to Distribute Funds, thwarted Jarrett's procedural moves, including competing parallel jurisdiction before Judge Mack of the Probate Court and Judge Stacey of the Circuit Court, which the District Court clearly saw through as ***"forum shopping"***. This attorney also hire probate and annuity experts, who carefully reviewed all estate considerations and were relied upon repeatedly by the lower Court.

Meanwhile, Jarrett and Brandy, who have opposed and questioned this attorney's work in this matter in their previous appeals, were engaged in excessive and double billing, client tampering, forum shopping, improper *ex parte* communications, unnecessary delay and waste in filing the Writ of Mandamus, which was later withdrawn 18 months later, and expending hundreds upon hundreds of hours towards solely pursuing their excessively requested attorneys fees. In essence, while this attorney was working for to protect the estate, Attorneys Brandy and Jarrett, particularly Jarrett, were working for the preservation and/or status quo of their originally requested attorneys fees. This is evidenced by Judge Rosen excluding THREE-HUNDRED HOURS OF JARRETT'S TIME WHERE THE COURT FOUND THAT THIS TIME WAS DEDICATED ONLY TO HIS ATTEMPTS TO COLLECT HIS ATTORNEYS FEES AND NOT TO THE BENEFIT OF THE ESTATE.

For the most part, this case was made complex solely because of Attorney Jarrett's obdurate attempt to literally rob from the estate to generate his excessive requested attorneys fees. It is submitted to this Court that this matter could have been completely resolved years ago were it not for the conduct of Attorneys Brandy and Jarrett, and particularly Attorney Jarrett, by reason of the City's quick response and efforts to offer, settle and assistance in working out the distribution. Absent Jarrett's obstinate conduct throughout — the failed attempts at divesting the district court of jurisdiction, the filing of the Writ of Mandamus, incessant Motions and attacks upon this Counsel, this matter could have and should have been resolved earlier. Following this tyrannical conduct, Petitioner is now the party belaboring this matter more by the filing of this judicially wasteful appeal. For this conduct, as outlined herein, counsel Jarrett should be punished and sanctioned from receiving his fees, allowing his fees to be directed back to the estate.

III. WHETHER THE DISTRICT COURT JUDGE ASSUMED THE ROLE OF AN ADVOCATE IN THIS CASE, REQUIRING DISQUALIFICATION.

It is submitted that the Court was concerned with ensuring that the interested parties received a fair distribution from the settlement.

As can be seen from the preceding arguments, the District Court judge acted within his discretion.

CONCLUSION

Based on the foregoing analysis and controlling law as established in the record below and in this brief herein, Respondent, Saunders V. Dorsey, respectfully requests that the decision of the United States Court of Appeals, Sixth

Circuit, be upheld.

Respondent also respectfully requests that the attorneys fees for Attorney Jarrett be denied and returned to the Estate for distribution, in light of the highly reprehensible conduct that has been outlined herein.

Justice Brandeis once wrote that "sunlight is the best disinfectant." If this case stands for anything, which this counsel submits it will for years to come, it should highlight the fact that the formulae for attorneys fees should not always be rigidly adhered to and that a co-personal representative, or any client for that matter, should not be enslaved to a former attorney who that party discharges with cause.

Saunders V. Dorsey — Date: 10-10-97

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Supreme Court, U.S.
FILED
OCT 14 1997
CLERK

No. 97-439

In The

Supreme Court of the United States

October Term, 1996

ERNEST L. JARRETT, Attorney,

Petitioner,

vs.

ROSE MARY GREEN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT FIRST BUSEY TRUST & INVESTMENT COMPANY (GUARDIAN OF THE ESTATE OF JACQUELINE DENNISON)

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SUPPLEMENT TO LIST OF PARTIES

The Petition for Writ incorrectly lists Kim Nihiser as mother and next friend of Jacqueline Dennison, a minor, as a respondent.

While she initially appeared on behalf of Jacqueline Dennison, this respondent, First Busey Trust and Investment Company, as Guardian of the Estate of Jacqueline Dennison, ultimately became the representative of said minor.

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Rule Cited:

Federal Rule of Civil Procedure, 41(a)(1)(ii) 1, 6

STATUTES INVOLVED

Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure:

> (1) *By Plaintiff;* by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (I) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Michigan Compiled Laws 600.2922:

> (5) Motion for settlement; hearing. If, for the purpose of settling a claim for damages for wrongful death where an action for those damages is pending, a motion is filed in the court where the action is pending by the personal representative asking leave of the court to settle the claim, the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement.
>
> (6) Damages; distribution. In every action under this section the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable

compensation for the pain and suffering, while conscious, undergone by the deceased person during the period interviewing between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows:

(a) The personal representative shall filed with the court a motion for authority to distribute the proceeds. Upon the filing of the motion, the court shall order a hearing.

(b) Unless waived, notice of the hearing shall be served upon all persons who may be entitled to damages under subsection (3) in the time, manner, and method provided in the rules applicable to probate court proceedings.

(c) If any interested person is a minor, a disappeared person as defined in section 4 of the revised probate code, Act No. 642 of the Public Acts of 1978, being section 700.4 of the Michigan Compiled Laws, or a legally incapacitated person for whom a fiduciary is not appointed, a fiduciary or guardian ad litem shall be first appointed, and the

notice provided in subdivision (b) shall be given to the fiduciary or guardian ad litem of the minor, disappeared person, or legally incapacitated person.

(d) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased. If there is a special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.

(e) If none of the persons entitled tot he proceeds is a minor, a disappeared person, or a legally incapacitated person and all of the persons entitled to the proceeds

> execute a verified stipulation or agreement in writing in which the portion of the proceeds to be distributed to each of the persons is specified, the order of the court shall be entered in accordance with the stipulation or agreement.

SUPPLEMENTAL STATEMENT OF CASE

Contrary to most wrongful death acts, under the Michigan Wrongful Death Act a broad spectrum of individuals are eligible as beneficiary. For example, the beneficiaries in the case at bar included two acknowledged daughters, an estranged wife, two children of the estranged wife by prior marriage, the parents and the siblings of the deceased.

From day one, the petitioner failed to appreciate the conflicting claims of the various beneficiaries. The petitioner attempted to force the federal court to approve a proposed settlement that distributed the money to the beneficiaries in a manner far different than what was ultimately approved. The proposed settlement, which the petitioner placed before the court, contained numerous structured settlements which would have prevented the court from allocating the proceeds in a different manner after an evidentiary hearing. Under the circumstances, the only proper course for the petitioner was to present a gross settlement without allocation.

The case was properly removed from state court in that a 42 U.S.C. § 1983 Civil Rights Act Claim was asserted. When the tortured procedural history of the case is analyzed, it is clear that the court had jurisdiction to enter the orders before in fact entered.

The petitioner's statement of the case is totally lacking in citation to the record and unfortunately contains statements that it is respectfully suggested are contrary to the record. The petitioner indicates that Rose Mary Green, the estranged wife, and Edniquech Grubbs, the adult daughter, retained the referring attorney Brunetta Brandy. Unfortunately, petitioner omits to advise that they separately retained her in their individual capacity. After they were appointed co-personal representatives, they did not either jointly or severally retain Brandy or anyone else as an attorney for the estate.

REASONS FOR DENYING THE WRIT

I.

THE COURT HAD AND PROPERLY RETAINED JURISDICTION.

In that a 42 U.S.C. § 1983 claim was asserted, there can be no question but what the case was properly removed to the district court and that the district court in fact had jurisdiction.

As to the petitioner's contention that a stipulation for dismissal of December 14, 1992 deprived the court of jurisdiction, there is no question but what on December 22, 1992 there was a stipulation as to the court's continued jurisdiction which obviously rendered the December 14 stipulation moot in the event it would have otherwise been valid.

It is respectfully suggested that while suit must be brought by the personal representatives, the beneficiaries are the real party in interest. They are required under Michigan law to be notified of significant actions and entitled to present a position in regards thereto to the court. MCL 600.2922. This respondent and the parents and siblings of the decedent were entitled to

and did object to the dismissal of the case. In any event, the purported dismissal of January 7, 1993 that petitioner relies upon was executed by Brunetta Brandy on behalf of co-personal representative Rose Mary Green but was not executed by Edniquech Grubbs, either through counsel or in her own right. Rule 41(a)(1)(ii) requires that all parties execute a stipulation to dismiss for the stipulation to be effective. The failure of Grubbs to execute the stipulation clearly rendered it void. Further, it is respectfully suggested the beneficiaries as interested parties had to execute the stipulation. Obviously, the reason Brandy attempted to use a stipulation rather than filing a motion was the certain knowledge on her part that the dismissal would be strenuously opposed by certain beneficiaries.

Accordingly, without reaching the inherent power of the court to refuse to give effect to a stipulated dismissal, it is clear the matter was properly before the court. Turning to the court's inherent power, the trial court and the Sixth Circuit properly noted that a court can refuse a voluntary dismissal so that *inter alia*, a person under disability, could be protected by the court. Jacqueline Dennison was a minor. At the time of the defendant's initial attempt to dismiss the case so as to attempt to affect approval of a settlement in state court, the court properly retained jurisdiction and urged the minor's mother that counsel be obtained. Counsel was obtained and as a result the settlement ultimately approved was substantially better for the minor. The presence of the 1983 claim further imposed upon the court a duty to oversee the settlement. In essence, the petitioner is complaining because the trial judge performed the duties required of him.

In summary, the court had jurisdiction. The trial court properly so-held and its holding was affirmed by the Sixth Circuit after a lengthy discussion on the merits.

II.

THE TRIAL COURT'S ORDER DID NOT CIRCUMVENT STATE LAW OR POLICY.

The petitioner's argument as to circumvention of state law or policy has as a predicate the assumption that there was a valid attorneys' contingent fee agreement that was binding upon the estate. The petitioner's concern is not for the proportions in which the court allocated money among the beneficiaries. Rather the petitioner's complaint is that the court did not allocate enough money to himself and Ms. Brandy for attorneys' fees.

The court set fees on a *quantum meruit* basis. The petitioner does not contend that the court improperly applied the *quantum meruit* test, rather he contends that he should have received a lump sum based on the existence of a contingent fee agreement. In fact, the only contingent fee agreements in question were with Brunetta Brandy. Thus, Mr. Jarrett who was brought in to assist Ms. Brandy must rely upon any agreements she made. It is undisputed that prior to their appointment as co-personal representatives, the widow Mrs. Greene and Edniquech Grubbs, the daughter of the decedent (who had just become an adult) entered separate individual contingent fee agreements with Ms. Brandy. These individual fee agreements did not purport to be executed by them as personal representative nor to authorize a claim to be brought on behalf of the estate. After they were appointed co-personal representatives, they did not enter either jointly or severally into a fee agreement on behalf of the estate or did not profess jointly or severally to ratify the individual fee agreements on behalf of the estate. Interestingly, the absence of a fee agreement entered into on behalf of the estate was unknown to the various beneficiaries until the court ordered that the fee agreements be produced. Thus, the fact that court approval may not be needed in Michigan for the personal representatives to

retain an attorney on behalf of the estate is not controlling since they did not in fact retain anyone. Thus, the statement in Appendix D sub-Appendix B that Rose Mary Greene in her capacity as co-personal representative retained Brandy and Jarrett is erroneous. However, it is to be noted in the same sub-appendix that petitioner does not claim that Edniquech Grubbs in her capacity as co-representative ever retained Brandy or himself.

In any event, by the time of the abortive initial settlement, Gerald Thurswell was representing Edniquech Grubbs (no written agreement has been produced to indicate the nature of the employment and on behalf of which capacity).

At the time of the initial proposed settlement, the case was pending in the federal district court. Section 600.2922(5) of the Michigan Compiled Laws provides that a motion may be filed in the court where the action is pending asking leave to settle and that the court *shall* conduct a hearing and approve or reject the proposed settlement. Further, in light of the fact there was a 1983 claim, the court by virtue of federal law had the duty and right to examine the settlement as to fairness.

Further, in the event of settlement, subsection 6 provides that there shall be a hearing upon notice to the beneficiaries and the court shall enter an order distributing the proceeds in the amount the court considers fair and equitable concerning the relative damages sustained by each. This is precisely what the court retained jurisdiction to do and ultimately did.

The petitioner's contention that the court was circumventing state law is clearly erroneous. To the contrary, the petitioner endeavored to ram down through the court without a hearing a settlement which the petitioner had allocated among beneficiaries with a conflicting interest and had structured in

such a way that the gross settlement could not be accepted without also accepting the allocation. In so doing, the petitioner was attempting to usurp the power of the court granted it by Michigan statutes and by federal statutes. Similarly, the petitioner's contention that the court was bound by law to follow the March 7, 1993 memorandum between the parties misses three obvious points. First of all, the section relied upon has as a predicate "if none of the persons entitled to the proceeds is a *minor* . . .". As the Court of Appeals correctly observed, Jacqueline Dennison was a minor! Accordingly, the section has no relevancy. Further, it is respectfully suggested the section does not control the court's duties and powers where there is a 1983 claim asserted. Finally, the section concerns allocation between the beneficiaries and does not speak to an agreement as to attorney's fees.

The trial court correctly analyzed the facts and the law and determined that there was not a valid contingent fee agreement. Accordingly, the fact that under Michigan law a valid contingent fee agreement up to a certain percentage should be enforced is of no relevancy. While the co-personal representatives acting together can retain an attorney, the fact of the matter is they did not do so after they were appointed co-personal representatives. To the contrary, by the time they were appointed co-personal representatives, Edniquech Grubbs had already obtained an attorney other than the referring attorney. Neither Grubbs nor Rose Mary Green ever retained the petitioner.

As observed earlier, there was not a valid contingent fee agreement entered into on behalf of the estate by the personal representatives. Thus, the petitioner's reliance on MCR 8.121 is without foundation. Accordingly, the affect of the statute need not be considered on this case.

III.

DISQUALIFICATION OF JUDGE.

As the court of appeals noted "there is no evidence of bias in this record". The motions were filed pursuant to 28 U.S.C. §§ 144 and 1455. Those sections must be read together. *Easley v. University of Michigan Board of Regents*, 853 F.2d 1351, 1355 (6th Cir. 1988). The record fails to disclose any merit whatsoever to the motion and thus there was no requirement for transfer to another judge. Further, disqualification under those sections is not based upon a disagreement with the judge's view of the law but rather upon a personal bias. The record below shows a great deal of disagreement between the petitioner and the court as to how the controlling law applied and as to what law controlled. The record is devoid of evidence that the judge had a personal bias against any of the parties or the attorneys. To the contrary, the judge showed admirable patience with the petitioner's machinations which resulted in a situation where the gross amount of the settlement was agreed to in December of 1992 but the order allocating the proceeds was delayed until November 7, 1994 (when the court entered its order on the October 21, 1994 hearing). There is no basis in the record to grant the certiorari petition based upon the claim that the judge should have been disqualified.

CONCLUSION

As the Circuit Court of Appeals observed in its opinion below, "it is time to bring an end to this unseemly spectacle". What a spectacle it has been. The petitioner's conduct delayed the initial partial distribution for a year and a half. To this day, a portion of the funds remain undistributed because of the petitioner's continuing appeals. While the petitioner certainly has the right to utilize the appellate procedure, there has been a thorough review by the Sixth Circuit resulting in a detailed opinion which correctly affirms the trial court. It is respectfully suggested the United States Supreme Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(4)

Supreme Court, U.S.
FILED
OCT 30 1997
CLERK

No. 97-439

In The

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October Term, 1996

ERNEST L. JARRETT, Attorney,

Petitioner,

vs.

ROSE MARY GREEN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT ROSE MARY GREEN

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SUPPLEMENTAL STATEMENT OF THE CASE

Respondent Rose Mary Green offers a supplemental statement of the case in order to correct the inaccuracies and omissions in the statement of the case submitted by the petitioner. In addition, respondent Rose Mary Green respectfully requests that the Petition for a Writ of Certiorari be disregarded and stricken by the Court under F.R.A.P. 34.6 because of the repeated inclusion of burdensome, irrelevant, immaterial, and scandalous matter. Of particular interest to the Court should be the petitioner's repeated reference to off-the-record conversations and his complete failure to cite to the Appendix or to the record.

And, of equal importance, is the petitioner's attempt to enlarge the issues on appeal by offering arguments that were never presented to the court below. A jurisdictional issue at the Court of Appeals is now framed as the impermissible intrusion of a federal district court into the exclusive province of the officials of the City of Detroit and an impermissible intrusion into the exclusive domain of the Michigan Supreme Court, all done with the intent to disregard state policy in favor of the court's own articulation of federal policy. The failure of the petitioner to present with accuracy, brevity, and clearness the information essential to the ready and adequate understanding of his petition is reason alone for denying that petition. F.R.A.P. 21.5.

This is a wrongful death case filed by Rose Mary Green and Edniquech Grubbs as co-personal representatives of the estate of Malice Wayne Green. Mr. Green was beaten to death by members of the Detroit Police Department on November 5, 1992. The wrongful death complaint was filed on November 9, 1992, in Wayne County Circuit Court and alleged, among other counts, violations of 42 U.S.C. §§ 1983, 1985 and 1986 (R.1).

On November 30, 1992, the defendant City of Detroit had the case removed under 28 U.S.C. § 1331 to the United States District Court for the Eastern District of Michigan (R.1).

Attorney Brunetta Brandy appeared as counsel on behalf of the co-personal representative Rose Mary Green and attorney Gerald Thurswell appeared on behalf of the co-personal representative Edniquech Grubbs, and the deceased's parents, sisters, and youngest daughter.

On December 29, 1992, the court received a letter from Mr. Thurswell informing the court that he was no longer representing the deceased's parents, sisters, and youngest daughter. In addition, Mr. Thurswell indicated that, on January 4, 1993, he was going to file a motion to withdraw as counsel for the co-personal representative Edniquech Grubbs. On January 4, 1993, attorney Justin Ravitz filed an appearance on behalf of the deceased's parents and sisters (R.5).

On January 7, 1993, appellant Brandy filed an appearance as co-counsel for the co-personal representative Edniquech Grubbs and filed a "Stipulation to Dismiss Action Without Prejudice" under F.R.C.P. 41(a)(1).

On January 11, 1993, the court met with all counsel and was informed that the settlement negotiations had broken down. At this hearing, the court also decided that the Thurswell motion to withdraw would be granted as soon as his clients obtained appropriate substitute counsel. With respect to the January 7th "Stipulation to Dismiss," the court was informed that Mr. Ravitz and Mr. Phebus, recently retained counsel for the deceased's youngest daughter, objected to the dismissal (R.34, pp. 9-10).

On February 1, 1993, the defendant City of Detroit filed a Motion to Dismiss under F.R.C.P. 12(b)(6) arguing that governmental immunity shielded the city from liability (R.18).

When the issue of jurisdiction was briefed, the plaintiffs argued that F.R.C.P. 41(a)(1) permitted dismissal by stipulation signed by all the parties who have appeared in the action and, since the January 7th stipulation had the signature of the defendant City of Detroit and attorney Brunetta Brandy as counsel for both personal representatives, the district court no longer had jurisdiction.

In ruling against the parties, the court looked beyond the named parties in the caption to those individuals who were required by Michigan's Wrongful Death Act to participate in this lawsuit. A distinction was made by the court between the personal representatives who had the legal capacity to institute a wrongful death action and the survivors who had an interest in recovering damages sustained as a result of Malice Green's death (R.34, p. 25). The court considered the survivors "parties in interest" and none of the survivors had signed the stipulation to dismiss.

As further support for its decision, the court relied upon the conduct of the parties in the months following the entry of the stipulation and found that their behavior constituted a waiver of the attempted dismissal (R.34, p. 27). The court also relied on *United States v. Mercedes Benz of North America, Inc.*, 547 F. Supp. 399, 400 (N.D. Cal. 1982), and decided that in the exercise of its inherent powers the court could look behind a stipulation "to determine whether there is collusion or other improper conduct giving rise to the dismissal." The improper conduct in this case was "characterized as 'forum shopping' and bad faith dealing with the Court." (R.34, p. 31).

And, in the court's opinion, the only objective of counsel was to sweep

> this matter under the rug with as little public and

> judicial scrutiny as possible; and, second, [to maximize] attorneys' fees for an ever growing number of attorneys who have done little, if any, real legal work on this case. The blatant forum shopping and ping-ponging between the federal court and the state circuit and probate courts engaged in by counsel as they search for a court which will, without public scrutiny, rubber-stamp their settlement and attorneys' fees is both offensive to this Court and not in the interests of the clients on either side of this case.

(R.34, p. 33).

The court was of the opinion that the attorneys were "putting their own desire for an excessive and disproportionate fee award ahead of their clients' interest in reaching a fair and expeditious settlement of the case" and that the only obstacle "to proceeding with formal consideration of a settlement proposal has been, almost from the beginning, the amount of proposed attorneys' fees relative to the value of the legal services provided." (R.34, p. 33).

On April 30, 1993, the co-personal representatives filed a motion for reconsideration and to vacate the memorandum opinion of April 13th. A motion for disqualification was filed by attorney Kenneth N. Hylton, representing Rose Mary Green in her individual capacity. Finding no palpable error, the court denied the motion for reconsideration; finding no evidence of racial bias, the court denied the motion for disqualification (R.51).

On May 27, 1993, a second motion for disqualification was filed, this time by attorney Ernest Jarrett, representing Rose Mary Green in her capacity as co-personal representative. This second motion was denied for the reasons stated in the denial of the

first disqualification motion — there were "no facts to objectively establish such personal bias emanating from a source other than the Court's participation in this case to warrant disqualification." (R.51, p. 38). In addition, the court concluded that Rose Mary Green's reliance on 28 U.S.C. § 144 in her first disqualification motion prevented her from relying on the statute a second time (R.67, p. 2).

On July 18, 1994, the district court entered a Consent Judgment which resolved the case by the defendant City of Detroit's payment to the plaintiffs of $5.25 million.

At a hearing on the distribution of proceeds conducted on October 21, 1994, the court heard oral arguments on the following motions: (1) the Motion of co-personal representative Rose Mary Green to dismiss this case for lack of subject matter jurisdiction; (2) the Motion of co-personal representative Edniquech Grubbs to dismiss this case for lack of subject matter jurisdiction; (3) the Motion of co-personal representative Edniquech Grubbs to amend the caption of the case; and (4) the contingency fee arrangements of the various attorneys.

On the issue of jurisdiction, the parties offered a "defective removal" argument — the court did not have subject matter jurisdiction because the counts involving a federal question in the complaint were made against the individual defendants, parties who were never served or appeared, while removal was obtained by the defendant City of Detroit, a party that was only defending against state law claims. With respect to the attorney fee issue, the attorneys were directed to submit evidence of their agreements with their clients for the court to review.

On November 8, 1994, the court issued its opinion in which it denied the motions to dismiss, granted the motion to amend, and clarified that the distribution of "settlement proceeds, and

the determination and distribution of attorneys' fees to be charged against the Estate of Malice Green, will be addressed in separate orders." (R.131, p. 32).

In denying the motion to dismiss for lack of subject matter jurisdiction, the court relied on *Grubbs v. General Electric Credit Corporation*, 408 U.S. 699, 92 S. Ct. 1344, 31 L. Ed. 2d 612 (1972), to find that the "defective removal" argument ignored well-established Supreme Court and Sixth Circuit Court precedent. The Supreme Court explained in *Grubbs* that

> where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

Id. at 1347.

The court found in the present case that "federal question jurisdiction under [the] civil rights statutes and the provisions of the United States Constitution appears *on the face of Plaintiff's Complaint*." (R.131, p. 9). Consequently, "this Court would have had original federal question jurisdiction over this action had the case been originally filed in federal court instead of in the state court."

With respect to the complaint, the district court found that Count V of the complaint — captioned "Deprivation of Constitutional Rights by Individual Defendants" — had incorporated by reference all of the allegations made in the previous counts and that by doing so the federal constitutional violations so obviously made in Count IV were also pled against the defendant City of Detroit in Count V of the complaint.

With respect to the contingent fee agreements, the court determined that two identical letters were sent to Rose Mary Green and Edniquech Grubbs regarding fees, but

> in neither of these letter agreements is there any indication that Ms. Brandy was representing the Estate of Malice Green, or that there was any understanding that she was to be paid fees by the "Estate." . . . Neither letter is signed by either Ms. Green or Ms. Grubbs in her *representative* capacity. . . . Nowhere in either letter is there any indication of Ms. Green's and Ms. Grubbs's co-representation of the Estate or that they jointly retained Ms. Brandy to represent the Estate of Malice Green. Moreover, the agreements were never ratified or approved by the Probate Court and no such ratification or approval order was ever filed.

(R.131, pp. 21-22).

The court went on to find that because

> Ms. Green and Ms. Grubbs did not *jointly* execute any agreement retaining Ms. Brandy on a 1/3 contingent fee basis *to represent the Estate* of Malice Green, or for payment of fees from Estate funds, Ms. Brandy has no binding written fee agreement with the Estate for $1,200,000.

Petitioner Jarrett filed a claim of appeal on August 23, 1995, and in that appeal, he argued that the district court improperly exercised jurisdiction; the district court improperly disallowed the fees payable to the plaintiffs' attorneys, and that the judge should have been disqualified. In support of his first argument, Jarrett claimed that there were no federal claims asserted against the defendant City of Detroit and, therefore, there was no

"pendent party" jurisdiction over the defendant City of Detroit "against whom no federal claims are alleged." In addition, the dismissal successfully obtained by stipulation of the parties ended this lawsuit.

In support of his second issue, Jarrett argued that the contingent fee agreement was valid because, although signed at different times and different places, it was the intent of the co-personal representatives to jointly bind the estate. With respect to his final argument, Jarrett maintained that the outcome of the many issues before the district court illustrated how biased and partial Judge Gerald Rosen was to the parties in this case. According to counsel, the judge's orders "should be vacated to the extent that they are contrary to the agreements of the parties, claimants and/or attorneys."

On appeal to the Sixth Circuit, the panel expressed its agreement with the lower court's decision to treat the next of kin who would share in a wrongful death judgment as "parties who had appeared in the action," agreed that it was "not at all clear that the co-personal representatives acted jointly, a requirement of Michigan law," and opined that the "conclusory and unsubstantial allegations in the motions to disqualify Judge Rosen required no action other than the response given in the orders denying these motions." (Appendix A, pp. 8, 11-12, 16).

SUMMARY OF ARGUMENT

The district court did have jurisdiction of this matter because the stipulated dismissal relied on by the attorneys to defeat the court's jurisdiction was not valid under the provisions of F.R.C.P. 41(a)(1) since it was not signed by all of the parties, and because original federal question jurisdiction clearly appeared on the face of the plaintiffs' complaint thereby defeating the challenge based on defective removal.

Second, the contingent fee agreement between the estate and the attorneys was not valid because the co-personal representatives did not jointly execute any agreement retaining Ms. Brandy on a 1/3 contingent fee basis to represent the Estate of Malice Green.

And, finally, the decision denying the motions for disqualification were proper because there was no evidence of bias on the record.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT HAD JURISDICTION OF THIS MATTER BECAUSE FEDERAL QUESTION JURISDICTION APPEARED ON THE FACE OF THE PLAINTIFFS' COMPLAINT AND BECAUSE THE DISMISSAL BY STIPULATION FAILED TO COMPLY WITH F.R.C.P. 41(a)(1).

Longstanding decisions of the United States Supreme Court make it clear that, when a federal court enters judgment after removal, the issue in subsequent proceedings on appeal is not whether the case was properly removed but whether the federal district court would have had subject matter jurisdiction had it been filed in that court originally. *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 92 S. Ct. 1344, 31 L. Ed. 2d 612 (1972).

With respect to the complaint in the present case, the district court found that Count V of the complaint — captioned "Deprivation of Constitutional Rights by Individual Defendants" — had incorporated by reference all of the allegations made in the previous counts and that by doing so

the federal constitutional violations so obviously made in Count IV were also pled against the defendant City of Detroit in Count V of the complaint.

With respect to the dismissal by stipulation, F.R.C.P. 41(a)(1) provides for dismissal of an action "by filing a stipulation of dismissal signed by all the parties who have appeared in the action." Here, the district court properly ruled that the stipulated dismissal that was submitted on January 7th was of no effect because it did not comply with the applicable court rule.

II.

THE TRIAL COURT PROPERLY RULED THAT THE CONTINGENT FEE AGREEMENT WAS NOT VALID BECAUSE THE CO-PERSONAL REPRESENTATIVES DID NOT JOINTLY EXECUTE ANY AGREEMENT RETAINING MS. BRANDY ON A 1/3 CONTINGENT FEE BASIS TO REPRESENT THE ESTATE OF MALICE GREEN OR FOR PAYMENT OF FEES FROM THE ESTATE.

Contingent fee contracts have long been commonly accepted in the United States in civil proceedings to enforce claims. However, under Michigan law, when two or more persons are named as co-personal representatives of an estate, the signature of only one of the co-personal representatives cannot bind the estate. *Action Auto, Inc. v. Anderson*, 165 Mich. App. 620, 624-625, 419 N.W. 2d 36 (1988).

With respect to the contingent fee agreements in this case, the co-personal representatives of the estate did not jointly execute the contingent fee agreement. And, without a contingency fee agreement, the district court had no alternative

but to award reasonable attorney fees on the basis of services rendered.

III.

THE TRIAL COURT PROPERLY DENIED THE MOTIONS FOR DISQUALIFICATION BECAUSE THERE WAS NO EVIDENCE OF BIAS ON THE RECORD.

Petitioner argues that the district court judge should have recused himself because all of the rulings he made exhibited a racial bias and an overriding desire to control the outcome of this lawsuit against the wishes of the parties and attorneys involved. However, on appeal, the Sixth Circuit found that the "conclusory and unsubstantial allegations in the motions to disqualify . . . required no action other than the response given in the orders denying these motions." Further review should be denied because the petitioner has failed to show that the federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." F.R.A.P. 17.

CONCLUSION

Respondent Rose Mary Green respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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